Supreme Court, U.S.
FILED

041677 APR 11 2005

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

JOHN MOULTRIE,

Petitioner,

v.

DR. C. HUCTHINSON,
JOHN SMITH, LAURA MALLO, JAN EPP,
CORRECTIONAL MEDICAL SERVICES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BY: John Moultrie #169151
G. Robert Cotton Correctional Facility
3510 N. Elm Street
Jackson, Michigan 49201-8877
(In Pro Se)

QUESTIONS PRESENTED

Whether the Sixth Circuit Court of Appeals and district court's decision finding that Respondents Correctional Medical Services, and their employees, Respondents Dr. Hutchinson and John Smith, who have been contracted by the Michigan Department of Corrections to provide health care for state prisoners, are not instrumentalities for the purposes of the Americans with Disabilities Act (ADA), is contrary to this court's existing precedent. Moreover, whether the courts' decision that Petitioner is not a per se individual with a disability, due to his Hepatitis C substantially limiting his major life functions of procreation, sexual relations, and blood filtration, is in conflict with decisions of other circuits?

Whether the failure to treat Petitioner's Hepatitis C with the recommended combination therapy amounts to deliberate indifference to Petitioner's serious medical needs. Moreover, whether Petitioner's claim amounts to simply a difference of medical opinion even though one qualified gastroentrologist recommended the treatment, and where Respondents CMS, Hutchinson, and Smith's motive for denying the treatment was the high cost of the treatment?

LIST OF PARTIES

Attorney for Petitioner:
John Moultrie #169151
G. Robert Cotton Correctional Facility
3510 N. Elm Street
Jackson, Michigan 49201-8877
(In Pro Se)

Attorneys for Respondents, Dr. C. Hutchinson,
John Smith, and Correctional Medical Services:
Chapman and Associates, P.C.
40950 North Woodward
Suite 350
Bloomfield Hills, Michigan 48304
(248) 644-6326

Attorney for Respondents, Mallo and Epp:
Assistant Attorney General
P.O. Box 30217
Lansing, Michigan 48909
(517) 335-7021

TABLE OF CONTENTS

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Cited Authorities v

Table of Appendices viii

Opinion Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Provided 2

Statement of the Case 2

Arguments 9

I. THE SIXTH CIRCUIT COURT OF APPEALS AND DISTRICT COURT'S DECISION FINDING THAT RESPONDENTS CORRECTIONAL MEDICAL SERVICES, AND THEIR EMPLOYEES, RESPONDENTS DR. HUTCHINSON AND JOHN SMITH, WHO HAVE BEEN CONTRACTED BY THE MICHIGAN DEPARTMENT OF CORRECTIONS TO PROVIDE HEALTH CARE FOR STATE PRISONERS, ARE NOT INSTRUMENTALITIES FOR THE PURPOSES OF THE AMERICANS WITH DISABILITIES ACT (ADA), IS CONTRARY TO THIS COURT'S EXISTING PRECEDENT. MOREOVER, THE COURTS' DECISION THAT PETITIONER IS NOT

A PER SE INDIVIDUAL WITH A DISABILITY, DUE TO HIS HEPATITIS C SUBSTANTIALLY LIMITING HIS MAJOR LIFE FUNCTIONS OF PROCREATION, SEXUAL RELATIONS, AND BLOOD FILTRATION, IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS. 9

II. **THE FAILURE TO TREAT PETITIONER'S HEPATITIS C WITH THE RECOMMENDED COMBINATION THERAPY AMOUNTS TO DELIBERATE INDIFFERENCE TO PETITIONER'S SERIOUS MEDICAL NEEDS. MOREOVER, PETITIONER'S CLAIM DOES NOT AMOUNT TO SIMPLY A DIFFERENCE OF MEDICAL OPINION WHERE ONE QUALIFIED GASTROENTROLOGIST RECOMMENDED THE TREATMENT, AND WHERE RESPONDENTS CMS, HUTCHINSON, AND SMITH'S MOTIVE FOR DENYING THE TREATMENT WAS THE HIGH COST OF THE TREATMENT.** 17

Conclusion 22

TABLE OF CITED AUTHORITIES

CASES:

Bragdon v Abbot, 524 U.S. 624; 118 S.Ct 2196; 141 L.Ed2d 540 (1998) 13-15

EEOC v R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999) 14

Estelle v Gamble, 429 U.S. 97; 97 S.Ct 285; 50 L.Ed2d 251 (1976) 17, 18

Farmer v Brennan, 511 U.S. 825; 114 S.Ct 1970; 128 L.Ed2d 811 (1994) 19-20

Helling v McKinney, 509 U.S. 25; 113 S.Ct 2475; 125 L.Ed2d 22 (1993) 19

Fiscus v Wal-Mart Stores, Inc., 385 F.3d 378 (3rd Cir. 2004) 15

Furnish v SVI Systems, Inc., 270 F.3d 445 (7th Cir. 2001) 15

Johnson v Million, 60 Fed. Appx. 548 (6th Cir. 2003) 20

McAlindin v County of San Diego, 192 F.3d 1226 (9th Cir. 1999) 14

McKay v Toyota Motor Mfg. U.S.A., Inc., 110 F.3d 369 (6th Cir. 1997) 10

Pennsylvania Dept. of Corrections v Yeskey, 524 U.S. 206; 118 S.Ct 1952; 141 L.Ed2d 215 (1998) 10

Powell v Alexander, 391 F.3d 1 (1st Cir. 2004) 14

Powell v City of Pittsfield, 221 F.Supp.2d
119 (D.Mass. 2002) 14

Quick v Tripp, Scott, Conklin & Smith, P.A.,
43 F.Supp.2d 1357 (S.D.Fla. 1999) 14-15

Sussle v Sirna Protection Systems Corp.,
269 F.Supp.2d 285 (S.D.N.Y. 2003) 15

Toyota Motor Mfg., Kentucky, Inc., v Williams,
534 U.S. 184; 122 S.Ct 681;
151 L.Ed2d 615 (2002) 13

West v Atkins, 487 U.S. 42; 108 S.Ct
2250; 101 L.Ed2d 40 (1988) 11, 21

Vandermolen v City of Roosevelt Park,
1997 WL 854505 (W.D. Mich. 1997) 11

Zimmerman v Prison Health Service, Inc.,
36 Fed. Appx. 202 (7th Cir. 2002) 21

STATUES - CONSTITUTION PROVISIONS - COURT RULES

FRE 803(4) 17

Fed. R. Civ. P. 12(b)(6) 6

Fed. R. Civ. P. 56(b) 7

SC Rule 13(1) 1

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 5, 8, 11

42 U.S.C. § 1997(e)(a) 6

42 U.S.C. § 12131(1) 5

42 U.S.C. § 12132 10

US Const Am VIII 2, 18

US Const. Am XIV 2

Black's Law Dictionary, (Bryan A Garner ed., 7th ed., West 1999) 12

Taber's Cyclopedic Medical Dictionary, (19th ed., F.A. Davis Co., 2001) 15, 16

TABLE OF APPENDICES

John Moultrie v Dr. C. Hutchinson, et al., United States District Court for the Eastern District of Michigan, Case No. 03-71516 (7/31/03) (Magistrate's Report and Recommendation, recommending the granting of defendants motions to dismiss and summary judgement) A-1

John Moultrie v Dr. C. Hutchinson, et al., United States District Court for the Eastern District of Michigan, Case No. 03-71516 (1/16/04) (District Court Memorandum Opinion & Order, summarily dismissing complaint) A-8

John Moultrie v Dr. C. Hutchinson, et al., Sixth Circuit Court of Appeals, Case No. 04-122) (1/14/05) (Order affirming district court's decision) A-24

Johnson v Million,80 Fed. Appx. 548 (6th Cir. 2003) .. A-30

Zimmerman v Prison Health Services, 36 Fed. Appx. 202 (7th Cir. 2002) A-34

Wil S. Hylton, writer at large, Sick on the Inside - Correctional HMOs and the Coming Prison Plague, (August 2003) (Harper's Magazine) A-39

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The July 31, 2003, United States District Court for the Eastern District of Michigan, Southern Division's Magistrate's Report and Recommendation (per Scheer, Mag) recommending the granting of defendant's motions to dismiss and summary judgment (Appendix ("Pet. App.") A-1) is unpublished. The United States District Court for the Eastern District of Michigan, dated January 16, 2004 (per Hood, J) Memorandum Opinion & Order, summarily dismissing civil rights compliant (Pet. App. A-8) is unpublished. The opinion of the United States Court of Appeals for the Sixth Circuit, filed January 14, 2005 (per Schrheinrich, Rogers, and Cook, JJ), affirming the dismissal of petitioner's civil rights complaint (Pet. App. A-24), is unpublished.

STATEMENT OF JURISDICTION

Petitioner seeks review of the United States District Court for the Eastern District of Michigan, Southern Division decision summarily dismissing his Civil Rights Complaint filed under 42 U.S.C. § 1983, Case No. 03-71516, and the Sixth Circuit Court of Appeals', January 14, 2005, order affirming the district court's decision, Case No. 04-1220.

This Petition is timely filed within 90 days of the Sixth Circuit Court of Appeals decision. SC Rule 13(1). This Court has jurisdiction to hear this Petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

American with Disabilities Act, 42 U.S.0 § 12132

§ 12132 Discrimination

"Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity."

STATEMENT OF THE CASE

Petitioner, John Moultrie, is a 50-year-old state prisoner with a history of chronic Hepatitis C (HCV). In 1994-1995, Petitioner received monotherapy for the disease with the drug Intron, which was unsucessful. Petitioner has been and continues to be incarcerated at JCF during the occurrences in

this case.

On March 15, 1999, a JCF physician, Dr. Ahmed, noted that Petitioner needed an evaluation for combination therapy with the drugs, Interferon and Ribavirin. On March 16, 1999, Plaintiff was seen by Dr. Mario Hurtado, a gastroenterologist at the Duane L. Waters (prison) Hospital (DLW). Dr Hurtados discussed the secondary effects of the combination therapy with Plaintiff and scheduled another appointment in three months. On August 6, 1999, Respondent, CMS, through their agent, Respondent, Dr. C. Hutchinson, denied the request for the combination therapy. (See, Civil Rights Complaint, ¶ 8-10, Exhibits 2-4).

On September 3, 1999, Dr. Ahmed noted that no prescription for combination therapy was recommended even though Petitioner's disease was worsening. On April 18, 2000, DLW gastroentrologist, Dr. Kanduru noted that Petitioner's HCV was worsening and that Petitioner seemed to be relapsing. The doctor recommended that combination therapy with the drugs Interferon and Ribavirin be discussed at the follow-up visit. On June 23, 2000, Respondent CMS, through their agents, Dr. W. Malatinsky and Mary Grossbauer RN, denied Petitioner the combination therapy for the HCV, noting that Petitioner's alanine aminotranserase levels (ALTs) must be elevated for over one year. They noted that older ALTs from around May of 1999 would be acceptable. On June 27, 2000, Dr. Ahmed responded by listing Petitioner's elevated ALTs from February and May of 1999. On September 26, 2000, Petitioner was again seen by Dr. Kanduru. Dr. Kanduru explained the side effects and failure rate of combination therapy to Petitioner. He recommended that Petitioner start the combination treatment. However, because the PCR was done in 1997, he requested a PCR and testing for a Hepatitis C genotype. (See, Civil Rights Complaint, ¶¶ 11-15, Exhibits 5-7).

On September 27, 2000, Petitioner's lab draws were completed. Testing revealed that Petitioner was a genotype lb, and that his RNA, PCR and ALTs were high. On January 2,

2001, Petitioner was again seen by Dr. Kanduru. Dr. Kanduru noted that Petitioner's PCR was now positive and his genotype was lb. Dr. Kanduru advised an EDG. After which, Petitioner could probably go on the combination therapy for HCV. (See, Civil Rights Complaint, ¶1 16-17, Exhibits 9-10).

Approximately eleven months passed before Petitioner was again seen regarding his HCV. On December 3, 2001, Dr. Ahmed requested that Petitioner receive the follow-up evaluation for HCV, and the initiation of the combination therapy. On December 11, 2001, Respondent CMS requested Petitioner's HCV worksheet and supporting lab results. On December 12, 2001, Dr. Ahmed faxed CMS Petitioner's June 9, 2000, HCV worksheet, as well as the January 9, 2001, gastroenterology consultation. (See, Civil Rights Complaint, ¶¶ 18-20, Exhibits 11-12).

On April 29, 2002, Petitioner filed a Step III Prisoner Grievance Appeal from Respondent Epp's decision, arguing that a determination had already been made that he should receive the combination therapy. Also, that the therapy had been evaluated and designated as to length of treatment. Petitioner again stated that "pending" was being used to suggest that he was being treated for the HCV. On July 2, 2002, the Step III respondent denied the grievance, holding that Petitioner's medical treatment was in accordance with policy and procedure. (See, Civil Rights Complaint, ¶ 28, Exhibits 18, 20).

On May 21, 2002, Respondent CMS, through their agents, Respondents Hutchinson and Smith, refused to provide Petitioner with the combination therapy for his HCV. Respondent Smith noted that a biopsy of Petitioner's liver showed a normal liver with no fibrosis. He discussed the case with Respondent, Hutchinson, and they decided that Petitioner was not a candidate for the combination therapy at that time. (See, Civil Rights Complaint, ¶ 29, Exhibits 21-22).

On April 17, 2003, Petitioner filed his Civil Rights Complaint under 42 U.S.C § 1983, in the United States District Court for the Eastern District of Michigan, maintaining that Respondents had violated his rights under the United States

Constitution, the American with Disabilities Act of 1990, 42 U.S.C. § 12131, and state law, by refusing to provide him with the appropriate standard of treatment for his HCV; including, but not limited to combination therapy with the drugs, Interferon and Ribavirin, or PEG-interferon and Ribavirin. Plaintiff also filed an Application for Appointment of Counsel, as well as requesting the court's assistance in securing the testimony of an expert in the field of gastroenterology. (See, Civil Rights Complaint, Causes of Action ¶¶ 1-4).

On June 6, 2003, Respondents, CMS, Hutchinson, and Smith, filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6). On July 8, 2003, Petitioner filed an objection to CMS, Hutchinson, and Smith's, Motion to Dismiss, with counter Motion for Summary Judgment, Brief in Support, and attached affidavits and exhibits.

On July 1, 2003, Respondents Mallo and Epp, filed a Motion for Summary Judgment under Fed. R. Civ. P. 12(B) and 42 U.S.C. § 1997E (sic), with Brief in Support. Additionally, on July 9, 2003, Respondents, CMS, Hutchinson, and Smith, filed a Supplemental Brief raising an additional defense under 42 U.S.C. § 1997(e)(a).

On July 22, 2003, Petitioner filed a Motion for Enlargement of Time in Which to File Responsive Pleadings to Mallo and Epp's Motion for Summary Judgment, as well as CMS, Hutchinson, and Smith's, Supplemental Brief.

On July 31, 2003, without affording Petitioner an opportunity to respond to Mallo and Epp's, July 1, 2003, Motion for Summary Judgment, or CMS, Hutchinson, and Smith's, July 9, 2003, Supplemental Brief, the Magistrate issued a Report and Recommendation recommending that the entire action be dismissed because Petitioner had failed to establish any violation of his federally secured constitutional rights by any indifference to his serious medical needs. (See, Appendix A-1--5, Magistrate's Report and Recommendation, pp. 2-7).

On August 8, 2003, Petitioner filed an Objection to the Magistrate's Report and Recommendation arguing, in pertinent part, that a consistent rise in his ALTs was an appropriate

indicator of his need for the combination therapy. He noted that his ALT levels have remained elevated since at least March 16, 1999, up until the present date. Also, that at least two physicians, one a gastroentrologist, had noted that his condition was worsening and recommended the combination therapy.

Petitioner further noted that he had alleged facts supporting that Respondents should have started the combination therapy a year earlier; that he had been denied combination therapy for a significant period of time due to Respondents' failure to advance timely treatment; that Respondents were using the word "pending" to suggest that he was being treated for the disease; and that Respondents' intentional delay in treating the disease had reduced his life expectancy.

Petitioner further alleged that Respondent CMS, and their agents, Hutchinson and Smith, have developed a practice of denying combination therapy to prisoners with HCV; that combination therapy can cost up to $1,700 per month, per infected prisoner; and that CMS and its agents were denying him the therapy solely to save money. (See, Plaintiff's Objection to Report and Recommendation, pp. 7-11).

On January 16, 2004, the district court entered an Opinion and Order accepting and adopting the Magistrate's Report and Recommendation, granting Respondents, CMS, Hutchinson, and Smith's, June 6, 2003, Motion to Dismiss, and granting Respondents, Epp and Mallo's, July 1, 2003, Motion for Summary Judgment Under Fed. R. Civ P. 12(b)(6), 56(b) and 42 U.S.C. § 1997. (See, Appendix A-8, District Court Opinion and Order, pp. A-8--20).

On April 26, 2004, Petitioner filed an appeal from the district court's summary dismissal of his civil rights complaint, arguing in pertinent part, that the district court erred in granting Respondents, CMS, Hutchinson, and Smith's motion to dismiss where Petitioner presented the district court with substantial evidence that Respondents are being deliberately indifferent to his serious medical needs by refusing to provide him with the combination therapy for his HCV.

Petitioner argued that the district court clearly erred in

granting CMS, Hutchinson, and Smith's motion to dismiss where he had presented the district court with substantial evidence that he is being denied combination therapy for his HCV on the basis of a custom or practice which was attributable to CMS, Hutchinson and Smith, and where they exercised final decision making authority regarding the request for combination therapy. Petitioner also argued that CMS, Hutchinson, and Smith, are liable under the ADA where they are acting as an instrumentality of the Michigan Department of Corrections, and where Petitioner is an individual with a disability, and where he is being discriminated against as a result of the disability. (See, Brief for Plaintiff-Appellant, Sixth Circuit Court of Appeals, Arguments II and III).

On January 14, 2005, the Sixth Circuit Court of Appeals affirmed the district court's Opinion and Order. The Sixth Circuit held, in pertinent part: that Respondents, -CMS, Hutchinson, and Smith, were not deliberately indifferent to Petitioner's medical needs; that allegations of medical malpractice or negligent diagnosis fail to state a claim under the Eighth Amendment; that federal courts are reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law; and that the theory of respondent superior cannot provide the basis for liability in § 1983 actions.

The Sixth Circuit also held that the district court properly granted summary judgment on Petitioner's ADA claim, holding that,"[r]egardless of whether the defendants are public entities Moultrie was not disabled under the ADA. A 'disability' under the ADA is a physical or mental impairment that substantially limits one or more major life activities. . . Moultrie's bare allegation of the limitations on a major life activity are insufficient to establish he was disabled." (See, Appendix A-24-28, Sixth Circuit Court of Appeals Order, pp. 1-5).

Hepatitis C is a chronic and potentially deadly disease which infects and damages the liver. It is the leading cause of liver disease and cirrhosis, as well as a common cause of liver cancer. HCV does its damage without recognizable physical or clinical symptoms. Chronic liver disease is the seventh or

eighth leading cause of death in America. Moreover, combination therapy with the drugs Interferon and Ribavirin, is an appropriate standard of treatment for someone with Hepatitis C, genotype la or lb. (See, Civil Rights Complaint, ¶¶ 34, 35, Exhibits 24-27).

Petitioner now states as follows in support of his Petition for Writ of Certiorari:

ARGUMENT I

THE SIXTH CIRCUIT COURT OF APPEALS AND DISTRICT COURT'S DECISION FINDING THAT RESPONDENTS CORRECTIONAL MEDICAL SERVICES, AND THEIR EMPLOYEES, RESPONDENTS DR. HUTCHINSON AND JOHN SMITH, WHO HAVE BEEN CONTRACTED BY THE MICHIGAN DEPARTMENT OF CORRECTIONS TO PROVIDE HEALTH CARE FOR STATE PRISONERS, ARE NOT INSTRUMENTALITIES FOR THE PURPOSES OF THE AMERICANS WITH DISABILITIES ACT (ADA), IS CONTRARY TO THIS COURT'S EXISTING PRECEDENT. MOREOVER, THE COURTS' DECISION THAT PETITIONER IS NOT A PER SE INDIVIDUAL WITH A DISABILITY, DUE TO HIS HEPATITIS C SUBSTANTIALLY LIMITING HIS MAJOR LIFE FUNCTIONS OF PROCREATION, SEXUAL RELATIONS, AND BLOOD FILTRATION, IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

The Sixth Circuit Court of Appeals' decision finding that Petitioner has failed to state a claim under the ADA is in conflict with the decisions of other circuit courts, and is in conflict with this Court's controlling precedent. Moreover, the Sixth Circuit has decided this important question of public

policy and federal law that has not been, but should be settled by this Court. The Sixth Circuit held as follows, in regard to Petitioner's ADA claim:

> "Moultrie argues that the district court erred in finding he failed to state a claim under the ADA because CMS was a public entity, given its contract with the state to provide medical care to inmates. Moultrie also argued that he had a disability that substantially limited a major life activity and that he was discriminated against, evidenced by his lack of appropriate medical care.
>
> The district court properly dismissed or granted summary judgment on Moultrie's ADA claim. Regardless of whether the defendants are public entities Moultrie was not disabled under the ADA. A 'disability' under the ADA is a physical or mental impairment that substantially limits one or more major life activities. McKay v. Toyota Motor Mfg. U.S.A., Inc., 110 F.3d 369, 371 (6th Cir. 1997). Moultrie's bare allegations of the limitations on a major life activity are insufficient to establish he was disabled." (See, Appendix A-28, Sixth Circuit Order, pp.4-5).

Title II of the ADA, which deals with public services, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

This Court has determined that the ADA is applicable to state prison inmates. Pennsylvania Dept. of Corrections v Yeskey, 524 U.S. 206; 118 S.Ct 1952; 141 L.Ed2d 215 (1998).

CMS, Hutchinson, and Smith's Liability Under the ADA

The district court held that CMS and their employees could not be held liable under the ADA, because CMS is a private contractor, and cannot be considered a public entity. Under 42

U.S.C. § 12131(1), the term "public entity" is defined as follows, in pertinent part:

> (1) Public entity
> The term 'public entity' entity means -
> (A) ay State or local government;
> (B) any department, agency, special purpose district, or other instrumentality of a State or States government . . . (Emphasis added).

In reaching this determination, the district court relied on the unpublished decision in Vandermolen v City of Roosevelt Park, 1997 WL 854505 (W.D. Mich. 1997), in support of independent contractors being outside the scope of the ADA's "public entity" definition. As noted, the Sixth Circuit declined to specifically rule on this question.

Petitioner submits that CMS, Hutchinson, and Smith are in an entirely different position than the contractors in Vandermolen, supra. The medical care of prisoners is a public function entrusted to the state, through the Michigan Department of Corrections. In discharging that function, the MDOC has chosen to enter into a long-standing, ongoing contract with CMS for the provision of these medical services.

Under similar circumstances, this Court in West v Atkins, 487 U.S. 42; 108 S.Ct 2250; 101 L.Ed2d 40 (1988), held that private medical contractors such as CMS and their employees are state actors for the purposes of § 1983:

> "Respondent, as a physician employed by North Carolina to provide medical services to state prison inmates, acted under the color of state law for the purpose of § 1983 when undertaking his duties in treating petitioner's injury. Such conduct is fairly attributable to the State." Id., 487 U.S. at 54. (Emphasis Added).

This Court's reasoning in West is no less applicable to the theory that Respondents, CMS, Hutchinson, and Smith are

"instrumentalit[ies] of the State" for the purposes of the ADA:

> "It is only those physicians authorized by the State to whom the inmate may turn. Under state law, the only medical care West could receive for his injury was that provided by the State . . . the fact that the State employed respondent pursuant to a contractual arrangement that did not generate the same benefits or obligations applicable to other 'state employees' does not alter the analysis. It is the physician's function within the state system, not the precise terms of his employment, that determine whether his actions can be fairly attributed to the State. Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner. Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of means to vindicate their Eighth Amendment rights." Id., 497 U.S. at 55-56. (Emphasis added).

Additionally, Black's Law Dictionary, 802 (Bryan A. Garner ed., 7th ed., West 1999), defines an "instrumentality" as:

> "A thing used to achieve an end or purpose . . . A means or agency through which a function of another entity is accomplished, such as a branch of a governing body."

Congress plainly intended that state and local governments, as well as their agencies and "instrumentalities", be subject to the ADA. As with § 1983, the state cannot divest itself of their statutory responsibilities to prison inmates by the simple expedient of contracting them away to private entities. Therefore, Respondents, CMS, Hutchinson, and Smith are instrumentalities of the Michigan Department of Corrections, and are "public entit[ies]" within the meaning of the ADA, and should find no refuge in their nominal status as private

contractors.

Individual with a Disability

To make a prima facie case under Title II of the ADA, Petitioner must show: (1) that he has a disability, (2) that he is otherwise qualified, and (3) that he is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely because of his disability.

Merely having an impairment does not make one disabled for the purposes of the ADA. Toyota Motor Mfg., Kentucky, Inc. v Williams, 534 U.S. 184, 195; 122 S.Ct 681; 151 L.Ed2d 615 (2002). A plaintiff "also need[s] to demonstrate that the impairment limits a major life activity." Id.

Petitioner submits that his HCV is a per se disability where the disease substantially limits the major life functions of procreation, sexual relations, and blood filtration. (See, Plaintiff's Objection to Defendants' Motion to Dismiss, pp. 15-16, Exhibit 1, ¶ 5; Brief for Plaintiff-Appellant, pp. 28-29).

In Bragdon v Abbot, 524 U.S. 624, 639; 118 S.Ct 2196; 141 L.Ed2d 540 (1998), this Court held that a plaintiff who was HIV-positive was "substantially limited" in her ability to reproduce in "two independent ways". Id., 524 U.S. at 639. First, she "imposes on the man a significant risk of becoming infected." Id. Second, she "risks infecting her child during gestation and childbirth." Id., 524 U.S. at 640.

In Bragdon, this Court expressly rejected the claims that a major life activity is limited to "those aspects of a person's life which have a public, economic, or daily character." Id., 524 U.S. at 638. On the contrary, this Court found that reproduction satisfied the statutory definition of major life activity because" [r]eproduction and the sexual dynamics surrounding it are central to life itself." Id., 524 U.S. at 638. Moreover, this Court did not required a showing that reproduction or the decision to reproduce was recurrent or a daily feature of life. This Court found it sufficient that reproduction - although generally not

routine - was comparable to importance to life activities such as working and learning. Id., 524 U.S. at 638-639.

This Court found that the risk of perinatal transmission of HIV deterred the plaintiff from voluntarily seeking to become pregnant, noting that the HIV infection did not make it physically impossible for the plaintiff to conceive, gestate, and give birth. Moreover, that the risk of transmission during pregnancy was considerably less than fifty-fifty, perhaps as low as eight percent. Despite this, this Court concluded that an HIV-positive woman's decision to avoid even that risk meant that HIV imposed a substantial limitation on reproduction. Id., 524 U.S. at 640-641.

To summarize, the Bragdon decision basically provides that a major life activity need not constitute volitional or public behavior; it need not be an activity that is performed regularly or frequently; but it does have to have importance to human life comparable to that of activities listed in the regulatory examples. Additionally, that a substantial limitation of a major life activity does not mean impossibility or even great physical difficulty. On the contrary, a substantial limitation is weighed in a broad, practical sense, and may include non-physical factors. Id.

Petitioner submits that the findings in Bragdon are equally applicable to his case. Hepatitis C is a chronic, potentially deadly, blood-borne infection which is transmitted through bodily fluids. As with the plaintiff in Bragdon, the HCV does not make it physically impossible for Petitioner and a potential female partner from seeking procreation, however, Petitioner's decision to avoid the risk of infecting the woman, imposes a substantial limitation on Petitioner's major life activities of procreation and sexual relationships. Moreover, the fact that Petitioner is incarcerated is of no consequence. Petitioner has served over 20 years on a parolable life sentence, and is a good candidate for parole. As this Court noted in Bragdon, there is no need to show that the decision to procreate was a daily feature of life - the touchstone is the importance of the function to the life of Petitioner. Id., 524 U.S. at 638-639.

Notably, following the decision in Bragdon, several courts have found that "sexual relations" is a major life activity for the purposes of the ADA. See, Powell v City of Pittsfield, 221 F. Supp.2d 119, 146-147 (D. Mass. 2002), aff'd, Powell v Alexander, 391 F.3d 1 (1st Cir. 2004); McAlindin v County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999); EEOC v R.J. Gallagher Co.,181 F.3d 645, 654 (5th Cir. 1999) (engaging in sexual relation, just like procreation, is a major life activity). See also, Quick v Tripp, Scott, Conklin & Smith, P.A., 43 F. Supp.2d 1357, 1368 (S.D. Fla 1999) (holding that Bragdon compels conclusion that limitations placed on major life activity of reproduction due to hepatitis C virus, qualifies as a recognized ADA disability). But see, Sussle v Sirna Protection Systems Corp., 269 F. Supp.2d 285, 306-310 (S.D.N.Y. 2003) (rejecting contention that HCV is per se disability, holding that whether HCV substantially limits sexual activity is to be determined on case-by-case basis).

Accordingly, Petitioner submits that the Sixth Circuit Court of Appeals' decision finding that he is not disabled under the ADA is in conflict with the aforecited decisions, and with this Court's decision in Bragdon.

Petitioner further submits that liver function is a major life activity within the meaning of the ADA. In Fiscus v Wal-Mart Stores, Inc., 385 F.3d 378 (3rd Cir. 2004), the court recognized that the kidneys elimination of waste from the blood is a major life activity under the ADA. Id., at 384. In so ruling, the Fiscus court acknowledged this Court's holding in Bragdon that a "major life activity" is not limited to "those aspects of a person's daily character." Id., at 383, citing, Bragdon, 524 U.S. at 638. The Fiscus court held that the processing and eliminating of waste from the blood is "central to the life process". Id., at 384, citing, Bragdon, 524 U.S. at 638. But see, Furnish v SVI Systems, Inc., 270 F.3d 445, 450 (7th Cir. 2001) (holding that liver function was not a major life activity under the ADA).

There is no fundamental difference between the kidneys and liver's "central [importance] to the life process". Notably, Taber's Cyclopedic Medical Dictionary, 1198-1200 (19th ed,

F.A. Davis Co. 2001), defines liver function as follows, in pertinent part:

> "The liver is one of the most metabolically active organs of the body . . . It synthesizes nonessential amino acids, deaminates excess amino acids for use in energy production . . . It is responsible for the production of bile salts, which emulsify fats in the small intestine. . . It converts monosaccharides other than glucose to glucose, and stores excess glucose as the starch glycogen, until such energy is needed . . . It produces enzymes to metabolize potentially harmful substances found in the portal circulation . . . into less toxic ones . . . It facilitates the conversion of levothyronine to the more metabolically active thyroid hormone, triiodothyronine . . . It discharges the breakdown products of hemoglobin . . . into bile . . . It synthesizes cholesterol as well as lipoproteins for the transport of fat to other body tissues; it converts fatty acids to acetyl groups or ketones, so they may be used as energy sources . . . Its macrophages (Kupffer cells) scavenge baceria, other pathogens, and senescent red blood cells for the portal circulation . . . It manufactures albumin, alpha-globulins and beta-globulins, complement components, and clotting factors, some of which are dependent on vitamin K . . . It stores copper, iron . . . and fat soluble vitamins A, D, E, and K."

Accordingly, Petitioner submits that the liver's function of removing waste and toxins from the blood is a major life activity within the meaning of the ADA.

Discriminating by Denying Medical Treatment

Petitioner had specifically pled that CMS's motive in denying the treatment was due to the combination therapy being expensive. The treatment cost up to $1,700 per month, per infected inmate, and the treatment last for one year. (See,

Plaintiff's Objection to Defendant's Motion to Dismiss, 7/8/03, p. 5, Exhibit A, ¶ 4).

Petitioner's allegations were further supported by the affidavits of fellow prisoners, Tommy Martin and Walter Arron [Mr. Martin died from HCV related complications in February of 2004], wherein, the prisoners attested that during 2002 and 2003 they were denied combination therapy for their HCV. Notably, in prisoner Martin's case, he was told by CMS physician, Dr. Antonini, that "health care was no longer paying for any specialized treatments, particularly treatment for Hepatitis C." In prisoner Arron's case, in response to his request for combination therapy, he was told by Dr. Antonini, "you have nothing coming". (See, Plaintiff's Objection to Defendants' Motion to Dismiss, 7/8/03, p. 5, Exhibits B-C).

Both affidavits were based on the affiant's personal knowledge, and any referenced statements were admissible where they were made for the purpose of medical treatment, or medical diagnosis in connection with the treatment. See, FRE 803(4).

It is well established that prisoners have an Eighth Amendment right to medical care. Estelle v Gamble, 429 U.S. 97, 104; 97 S. Ct 285; 50 L.Ed2d 251 (1976). Petitioner presented the district court with issues of material fact supporting that Respondents CMS, Hutchinson, and Smith, are instrumentalities under the ADA; that as a result of his HCV, he is a per se individual with a disability; and that Respondents CMS, Hutchinson, and Smith, discriminated against him as a result of the disability by denying him the benefit of treatment for the disease solely on a discriminatory basis. The Sixth Circuit Court of Appeals wrongly affirmed the district court's summary dismissal of his case.

ARGUMENT II

THE FAILURE TO TREAT PETITIONER'S HEPATITIS C WITH THE RECOMMENDED COMBINATION THERAPY AMOUNTS TO

DELIBERATE INDIFFERENCE TO PETITIONER'S SERIOUS MEDICAL NEEDS. MOREOVER, PETITIONER'S CLAIM DOES NOT AMOUNT TO SIMPLY A DIFFERENCE OF MEDICAL OPINION WHERE ONE QUALIFIED GASTROENTROLOGIST RECOMMENDED THE TREATMENT, AND WHERE RESPONDENTS CMS, HUTCHINSON, AND SMITH'S MOTIVE FOR DENYING THE TREATMENT WAS THE HIGH COST OF THE TREATMENT.

The district court and Sixth Circuit Court of Appeals held that Respondents, CMS, Hutchinson, and Smith, were not deliberately indifferent towards Petitioner's medical circumstances. The Sixth Circuit's order seemed to suggest that the claim amounted to only a difference of medical opinion, and did not rise to the level of deliberate indifference to Petitioner's serious medical needs.

The district court also held that Petitioner had failed to plead the requisite factual allegations against CMS to sustain his burden of proof that CMS physicians failed to treat his HCV in reliance on an unconstitutional policy, practice, or procedure officially adopted by CMS. (See, Appendix , District Court Opinion and Order, A-11--20; Sixth Circuit Court of Appeals Order, A-24–28). The Sixth Circuit and district court's decisions are in conflict with this Court's controlling precedent.

The Eighth Amendment forbids prison officials from "unnecessarily and wantonly inflicting pain" on an inmate by acting with "deliberate indifference" towards the inmate's serious medical needs. Estelle v Gamble, supra, 429 U.S. at 105. A prison official's deliberate indifference violates these rights when the indifference is manifested by "prison [officals] in intentionally denying or delaying access to medical care" for a serious medical need. Estelle, 429 U.S. at 104.

In Estelle, this Court further explained this rationale, as follows:

"An inmate must rely on prison authorities to treat his medical needs, if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical 'torture or a lingering death' . . . In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose." Id.,429 U.S. at 103.

An Eighth Amendment claim for the denial or delay of medical care has an objective and subjective component. Farmer v Brennan, 511 U.S. 825, 834; 114 S.Ct 1970; 128 L.Ed2d 811 (1994). The objective component requires the existence of a "sufficiently serious" medical need. Farmer, 511 U.S. at 834; Estelle, 429 U.S. at 104. In Farmer, this Court explained that "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." Id., 511 U.S. at 834.

The subjective component requires an inmate to show that prison officials have "a sufficiently culpable state of mind in denying medical care." Farmer, 511 U.S. at 834. The subjective component "should be determined in light of the prison authorities' current attitudes and conduct." Helling v McKinney, 509 U.S. 25, 36; 113 S.Ct 2475; 125 L.Ed2d 22 (1993). Deliberate indifference "entails something more than mere negligence," Farmer, 511 U.S. at 835, but can be "satisfied by something less than acts or ommisions for the very purpose of causing harm or with knowledge that harm will result." Farmer, 511 U.S. at 835.

Petitioner submits that Hepatitis C is unquestionably a "serious medical need". Petitioner also presented the district court with sufficient facts to support that Respondents CMS, Hutchinson, and Smith, were deliberately indifferent to his need for the combination therapy in order to treat the disease.

On March 15, 1999, Dr. Ahmed requested an evaluation for combination therapy. On August 6, 1999, Respondents, CMS and Hutchinson denied the request. (See, Civil Rights Complaint, ¶ 8-10, Exhibits 2-4). On September 3, 1999, Dr.

Ahmed noted that no combination therapy was recommended even though the disease was worsening. On April 18, 2000, Dr. Kanduru, a gastroentrologist, noted that the HCV was worsening and that Petitioner was relapsing. On June 23, 2000, Respondent CMS, denied the request for combination therapy, noting that Petitioner's ALTs must be elevated for over one year. On June 27, 2000, Dr. Ahmed responded by listing Petitioner's elevated ALTs throughout the previous year. On September 26, 2000, Dr. Kanduru, recommended that Petitioner start the combination therapy. He requested a PCR and testing for a HCV genotype. (See, Civil Rights Complaint, ¶¶ 11-15, Exhibits 5-7).

The testing was completed and revealed that Petitioner was a genotype lb, and that his RNA, PCR and ALTs were high. Dr. Kanduru noted Petitioner's PCR was now positive and that his genotype was lb. (See, Civil Rights Complaint, ¶¶ 16-17, Exhibits9-10).

Almost a year later, Dr. Ahmed again requested that Petitioner receive the combination therapy. On February 8, 2002, Dr. Thakur noted that Petitioner's testing was completed and that the gastroenterology consultation recommended combination therapy. (See, Civil Rights Complaint, ¶¶ 18-22, Exhibits 11-14).

On May 21, 2002, Respondents CMS, Hutchinson, and Smith changed the protocol for the combination therapy, finding that Petitioner was not a good candidate due to his liver biopsy showing a normal liver with no fibrosis. (See, Civil Rights Complaint, ¶ 29, Exhibits 21-22).

Petitioner submits that Respondents CMS, Hutchinson, and Smith were aware of the fact that the refusal to provide Petitioner with the combination therapy would continue to expose Petitioner to the continued risk of serious harm by the HCV, and that they chose to ignore the risk. Farmer, 511 U.S. at 837.

Additionally, both the Sixth and Seventh Circuit have issued at least two unpublished opinions which clearly conflict with the Sixth Circuit's decision in this case. In Johnson v

Million, 60 Fed. Appx. 548 (6th Cir. 2003), the court affirmed the district court's granting of summary judgment in favor of defendants, finding that Kentucky prison medical officials had not been deliberatly indifferent to the prisoner's HCV by refusing to treat him with the drugs Interferon and Ribavirin. The court relied on the defendant's HCV expert's affidavit stating that it was "standard clinic practices not to . . . treat with interferon and ribavirin those Hepatitis C patients whose ALT values remain normal." Id, at 549. (See, Appendix A-29).

Similarly, in Zimmerman v Prison Health Service, Inc., 36 Fed. Appx. 202 (7th Cir. 2002), the Seventh Circuit affirmed the district court's denial of injunctive relief, finding in part, that combination therapy with the drugs Interferon and Ribavirin does not usually begin until after a liver biopsy has been performed to determine the patient's particular HCV genotype. Id., at 203-204. (See, Appendix A-34).

Petitioner has been infected with HCV for a minimum of eleven years. Morever, Petitioner's ALT levels have remained elevated since at least March 16, 1999, up until the present date. (See, Objection to Magistrate's Report and Recommendation, pp. 8-9, Exhibits 11-19). Additionally, Petitioner has had two liver biopsies to determine his HCV genotype. (See, Objection to Magistrate's Report and Recommendation, p. 9, Exhibits 20-22).

As noted, the district court had also held that Petitioner had failed to plead that CMS had developed a practice and/or custom of denying combination therapy for HCV. Contrariwise, Petitioner had specifically pled that CMS's motive in denying the treatment was due to the combination therapy being expensive. The treatment cost up to $1,700 per month, per infected inmate, and the treatment lasts for one year. (See, Plaintiff's Objection to Defendant's Motion to Dismiss, 7/8/03, p. 5, Exhibit A, ¶ 4).

Petitioner's allegations that CMS was denying combination therapy for HCV due to the high cost of the treatment, were further supported by the affidavits of fellow prisoners, Tommy Martin and Walter Arron. (See, Plaintiff's Objection to

Defendants' Motion to Dismiss, 7/8/03, p. 5, Exhibits B-C).

Petitioner further submits that CMS had been contracted by the MDOC to provide for the health care needs of prisoners. As a result, CMS has a discriminatory monetary interest when determining a prisoner's request for medical treatment.

When construing these factual allegations as true, Petitioner had clearly set forth sufficient facts to support that CMS, on the basis of its practice or custom, refused to provide him with the combination therapy for his HCV. West, supra, 487 U.S. at 54.

CONCLUSION

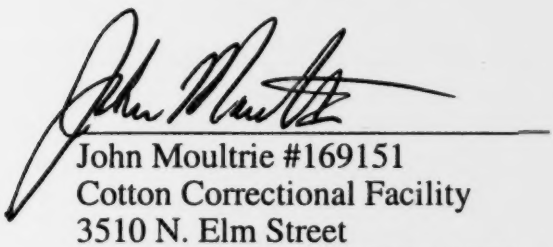
The virus which causes Hepatitis C was identified a little more than ten years ago. About forty percent of Americans infected with HCV reside in correctional institutions. Most of the prisoners will be eventually released back into society. In a credible report by Wil S. Hylton, writer at large, Sick on The Inside - Correctional HMOs and the Coming Prison Plaque, (August 2003) (Harper's Magazine), Mr. Hylton wrote, "The Association of State and Territorial Health Officials noted in a 2000 report that an 'estimated 1.4 million HCV-infected persons pass through the correctional system each year . . . CMS discourages treatment for hepatitis, and the protocol pathway is just a way of making it harder for prisoners to demand it . . . for the 214,000 prisoners whose health is supervised by CMS, the hepatitis epidemic continues to grow, untested and untreated, virtually unencumbered by the forces of modern medicine . . . 'The fewer patients they treat, the more money they make . . . There is a standard for testing and treatment of hep C that the Center for Disease Control came out with, and CMS simply is not heeding it.'" (See, Appendix A-44, 45, 47, Report from, Wil S. Hylton, quoting in part, Michael Steinberg, Michigan ACLU).

Petitioner has presented this Court with important questions of federal law and public policy. To summarize, Petitioner submits that Respondents CMS, Hutchinson, and Smith, are instrumentalities under the ADA; Petitioner is a per se

individual with a disability under the ADA due to the HCV limiting his major life functions of procreation, sexual relations, and blood filtration; that he is being discriminated against by denying the treatment for the HCV; and that Respondents are being deliberately indifferent to his serious medical needs by denying him treatment for the HCV.

Petitioner respectfully requests that this Court grant Certiorari on these important questions of public policy and federal law.

Respectfully submitted,



John Moultrie #169151
Cotton Correctional Facility
3510 N. Elm Street
Jackson, Michigan 49201-8877
(In Pro Se)

Dated: 6-6-05

UNITES STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN MOULTRIE,

Plaintiff,

Civil Action No.
03-CV-71516-DT

vs.

DISTRICT JUDGE
DENISE PAGE HOOD

MAGISTRATE JUDGE
DONALD A. SCHEER

DR. C. HUTCHINSON, JOHN SMITH, LAURA MALLO, JAN EPP, and CORRECTIONAL MEDICAL SERVICES, INC.,

Defendants.
_____/

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

RECOMMENDATION: Defendants' respective Motions to Dismiss should be GRANTED as Plaintiff has failed to establish any violations of his federally secured constitutional rights by any deliberate indifference to his serious medical needs.

* * *

Plaintiff, while incarcerated at the G. Robert Cotton

Correctional Facility in Jackson, Michigan (JCF),[1] was allowed to proceed in forma pauper is and filed the instant Complaint, pursuant to 42 U.S.C. § 1983, on April 17, 2003. The events giving rise to the action occurred between March 1999, and May 2002 at JCF. Defendants Epp (Regional Health Administrator for the Michigan Department of Correction (MDOC) and Mallo (Grievance Reviewer) and are both employees of the MDOC. Plaintiff also named Correctional Medical Services (CMS), a Michigan corporation contracted to provide medical services and physician care to prison inmates within the Michigan Department of Corrections. Drs. Hutchinson and Smith are employees of CMS.

Plaintiff alleges that he was denied adequate medical care for hepatitis C, a chronic liver disease. He claims that Defendants CMS, Hutchinson and Smith refused to authorize a combination drug therapy for his liver disease even though several examining physicians recommended such treatment. Contending that Defendants violated his right to be free from cruel and usual punishment under the Eighth Amendment by failing to properly treat his liver disease, Plaintiff sought declaratory and injunctive relief as well as monetary damages.

Defendants CMS, Hutchinson and Smith filed a Motion to Dismiss on July 10, 2003, based upon a failure to state a claim of a lack of proper medical care. Defendants denied any deliberate indifference to a serious medical need. Defendants Mallo and Epp filed a separate Motion to Dismiss on July 2, 2003. They maintained that they were not deliberately or wantonly indifferent to Plaintiff's serious medical needs, and that they did not knowingly refuse to provide urgently needed medical care so as to cause residual injuries which could have been prevented with timely attention. In a Reply to Defendants' Motion to Dismiss dated July 28, 2003, Plaintiff essentially reiterated the allegations in his Complaint.

[1]Plaintiff is still incarcerated at JCF.

SUPERVISORY RESPONSIBILITY

The general rule is that a claim for monetary damages under § 1983 requires the averment of some specific, personal wrongdoing on the part of the individual defendant. Theories of vicarious liability or respondeat superior are not sufficient. Rizzo v. Goode, 423 U.S. 362, 376 (1976). In addition, it is obduracy and wantonness, not inadvertence or error in good faith, that characterizes the conduct prohibited by the Cruel and Unusual Punishment Clause. Whitley v. Albers,475 U.S. 312, 319 (1986).

Defendants Epp and Mallo were apparently sued because of their respective positions of authority and supervisory responsibilities within MDOC and JCF. However, the mere fact that a supervisory person is in a position of authority does not allow imposition of liability against him or her. A supervising official's failure to supervise, control or train an offending individual is not actionable unless the supervisor "either encouraged the specific incident of misconduct or in some other way directly participated in it." Poe v. Hayden,853 F.2d 418, 429 (6th Cir. 1988). To the extent Plaintiff complains about a failure to respond to his grievances, the general rule is that a combination of knowledge of a prisoner's grievances and failure to respond to or remedy the complaints is insufficient to impose liability upon supervisory personnel under § 1983. Id.

Defendants Epp and Mallo were merely part of the MDOC and JCF administration during the relevant time. There is no evidence that any "policy" personally promulgated by them had anything to do with Plaintiff's treatment. Moreover, Plaintiff has not shown that the Defendants had "actual knowledge of a breakdown in the proper workings of the department." See Hill v. Marshall, 962 F.2d 1209, 1213 (6th Cir. 1992). Absent a showing that they were personally or directly involved, Defendants Epp and Mallo should not be held liable. Accordingly, the claims against them should be dismissed regardless of the constitutional sufficiency of Plaintiff's actual treatment.

INADEQUATE MEDICAL TREATMENT

In order to establish an Eighth Amendment claim for improper or inadequate medical treatment, a prisoner must show "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). In addition, mere negligent inattention to a prisoner's request for assistance does not offend substantive due process under the Fourteenth Amendment, Davidson v. Cannon, 474 U.S. 344 (1986), and medical malpractice does not become a constitutional violation merely because the victim is a prisoner. Estelle, 429 U.S. at p. 106. Basically, there must be a knowing failure or refusal to provide urgently needed medical care which causes a residual injury that could have been prevented with timely attention. The court must consider the wide discretion allowed prison officials in their treatment of prisoners under authorized medical procedures. Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir.1976).

A review of the circumstances here clearly reveals that Plaintiff's medical needs were not met with "deliberate indifference," "intentional delay," or "delay of access to medical care." Estelle, 429 U.S. at 104-105. Based on the allegations in the Complaint, Plaintiff's medical needs were not treated with deliberate indifference. Plaintiff does not allege that Drs. Hutchinson and Smith failed to treat his hepatitis in a timely fashion. His only allegation was that the doctors decided not to prescribe a combination of interferon and riavirin to treat his liver disease after a February 11, 2002, ultrasound guided liver biopsy appeared normal (Complaint § 25-26).

Even accepting the facts as provided by Plaintiff, the record is clear that the named Defendants were not deliberately or wantonly indifferent to his serious medical needs. They did not knowingly refuse to provide urgently needed medical care, and their conduct did not lead to residual injuries which could have been prevented with timely attention. Although Plaintiff may not have been happy with the decision not to treat his liver

disease with the combination drug therapy, the record demonstrates that health care personnel were at all times responsive to his medical condition. Plaintiff was not denied reasonable requests for medical treatment. Medical providers monitored his liver condition on a regular basis, but found that the particular treatment requested by Plaintiff was not medically necessary. In situations such as this, where there is a substantial record of medical treatment, or simply a difference of opinion between a prisoner and prison doctors, the requisite deliberate indifference has usually been held not to exist. Smartt v. Villar, 547 F.2d 112, 114 (10th Cir. 1976); Mayfield v. Craven, 433 F.2d 873 (9th Cir. 1970).

For the foregoing reasons, it is recommended that Defendants' respective Motions to Dismiss be granted and the instant case be dismissed. The parties are advised that any objections to this Report and Recommendation must be filed with the Court within ten (10) days after they are served with a copy, or further appeal from Judge Hood's acceptance thereof is waived.

/s/
DONALD A. SCHEER
UNITED STATES MAGISTRATE JUDGE

DATED: July 31, 2003

UNITES STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN MOULTRIE,

Plaintiff,

Civil Action No.
03-CV-71516-DT

vs.

DISTRICT JUDGE
DENISE PAGE HOOD

MAGISTRATE JUDGE
DONALD A. SCHEER

DR. C. HUTCHINSON, JOHN SMITH, LAURA MALLO, JAN EPP, and CORRECTIONAL MEDICAL SERVICES, INC.,

Defendants.
_____/

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Report and Recommendation was served upon the attorneys of record or parties appearing in pro per in the above cause by mailing the same to them at their respective address with postage fully prepaid thereon, on this 31st day of July, 2003.

John Moultrie
#169151
G. Robert Cotton Correctional Facility
3510 Elm Street
Jackson, MI 49201-8877

Christine Campbell
Assistant Attorney General
Corrections Division
P.O. Box 30217
Lansing, MI 48909

Ronald W. Chapman
40950 N. Woodward
Suite 350
Bloomfield Hills, MI 48304

/s/
Larry Gropman, Law Clerk to
Magistrate Judge Donald A. Scheer

UNITES STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN MOULTRIE,

Plaintiff,

Civil Action No.
03-CV-71516-DT

vs.

DISTRICT JUDGE
DENISE PAGE HOOD

MAGISTRATE JUDGE
DONALD A. SCHEER

DR. C. HUTCHINSON, JOHN SMITH, LAURA MALLO, JAN EPP, and CORRECTIONAL MEDICAL SERVICES, INC.,

Defendants.
_____/

MEMORANDUM OPINION & ORDER

I.. Introduction

This matter is before the Court on Magistrate Judge Donald A. Scheer's Report and Recommendation dated July 31, 2003. Plaintiff filed timely objections to the Magistrate Judge's Report and Recommendation on August 14, 2003.

For the reasons set forth below, the Court ACCEPTS Magistrate Judge Scheer's Report and Recommendation.

Accordingly, this Court ADOPTS Magistrate Judge Scheer's Recommendation and GRANTS Defendants, Dr. Hutchinson, John Smith and Correctional Medical Services' Motion to Dismiss. Likewise, the Court ADOPTS Magistrate Judge Scheer's Recommendation and GRANTS Defendants, Jan Epp and Laura Mallo's, Motion for Summary Judgment Under Fed. R.Civ. P. 12(b)(6), 56(b) and 42 U.S.C. §1997e.

II. Standard Of Review Relative To The Magistrate's Recommendation

This Court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. §636(b) (1) (C) . The Court "may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate." Id.

III. Statement of Facts

While Plaintiff has been incarcerated at the G. Robert Cotton Correctional Facility he has been suffering with Hepatitis C.[1] Plaintiff received monotherapy treatment for his condition with the drug Intron in 1994-1995. C. Kanduru, M.D. and J. Ahmed, M.D. , consulting physicians, examined Plaintiff and indicated that the monotherapy treatment he received five to six years earlier was no longer controlling his Hepatitis condition and that a combination treatment of Interferon and Ribavirin was an idea that was ripe for discussion. (Plaintiffs Objection to Magistrate's Report and Recommendation, Exhibits 12, 14, 15, 20, 21). When Plaintiff submitted a formal request for the combination Hepatitis treatment to Defendants, his request was denied.. (*Id.*, Exhibits 24-25). Plaintiff asserts that Defendants'

[1] Plaintiff states that he has been afflicted with Hepatitis C for a minimum of ten years. (Plaintiff's Objection to Magistrate's Report and Recommendation), pg. 8).

denial of the combination Hepatitis drug therapy by Defendants is representative of their conscious disregard for his health and welfare. He further argues that Defendants' finding that the combination drug therapy was not medically necessary equates with a deliberate indifference relative to his medical care. Accordingly, Plaintiff alleges that these

Defendants violated his civil rights under the Eighth Amendment.[2]

Plaintiff named as party Defendants, Hutchinson and Smith (employees of Correctional Medical Services and treating physician and physician's assistant respectively) ; Correctional Medical Services (a Michigan corporation contracted to provide medical services and physician care to prison inmates within the Michigan Department of Corrections); Jan Epp (Regional Health Administrator for the Michigan Department of Corrections); and Laura Mallo (Nursing Supervisor).

Defendant Correctional Medical Services (CMS), Dr. Hutchinson and John Smith filed a Motion to Dismiss. Subsequently, Defendants, Jan Epp and Laura Mallo filed a separate Motion for Summary Judgment. Magistrate Judge Scheer recommended that this Court grant both Motions and dismiss Plaintiff's Complaint. Plaintiff has filed timely objections to Magistrate Judge Scheer's Report and Recommendation which are presently before the Court.

---

[2]Plaintiff raised the claim of Defendants' violation of the American with Disabilities Act (ADA) 42 U.S.C. §12132, et. seq.; and Defendants raised the defenses of failure to exhaust administrative remedies and qualified immunity in the proceedings before Magistrate Judge Scheer. However, neither of these issues are addressed in Magistrate Judge Scheer's Report and Recommendation; and Plaintiff does not raise these issues in his Objection to Magistrate's Report and Recommendation. The Court finds that in light of Magistrate Judge Scheer's finding of no Eighth Amendment violation in this case, it was not necessary to analyze the exhaustion of remedies and qualified immunity defenses. However, relative to the alleged ADA violation, the Court will address the issue below for completeness.

IV. Applicable Law & Analysis

A. Liability of Jan Epp and Laura Mallo

Magistrate Judge Scheer opined that Plaintiff's only allegations of liability against Defendants Epp and Mallo are that they were in supervisory positions over the individuals that were more directly involved with Plaintiff's medical treatment, Magistrate Judge Scheer stated:

> A supervising official's failure to supervise, control or train an offending individual is not actionable unless the supervisor "either encouraged the specified incident of misconduct or in some other way directly participated in it." *Poe v. Hayden*, 853 F.2d 418, 429 Cir. 1988) (*Report and Recommendation, dated 7/31/03, pg. 4*) .

Plaintiff's retort to the Magistrate Judge's finding is that Defendants Epp and Mallo were made aware of Plaintiff's circumstances through his grievances; and their failure to respond favorably to his requests for the combination Hepatitis drug therapy amounted to a conscious disregard for his physical health. "Defendant's approved and knowingly acquiesced in the unconstitutional conduct by rejecting Plaintiff's grievances, despite having the authority to intervene and direct that Plaintiff be provided with the combination therapy." (*Plaintiff's Objection to Magistrate's Report and Recommendation. pg. 6*). Secondly, Plaintiff asserts that Defendants Epp and Mallo attached affidavits to their Motion for Summary Judgment which specifically set forth their knowledge about Plaintiff's circumstances and their degree of involvement. Plaintiff maintains that those affidavits should be stricken because there is no language in the body of the affidavit which states that the affiants had personal knowledge about the statements contained within the text of the affidavit.

Addressing Plaintiff's second argument first, the Court finds that it was not necessary for Defendants Mallo and Epp to specifically state that they had personal knowledge of their involvement in Plaintiff's efforts to seek combination drug therapy for his Hepatitis condition. Defendants' affidavits were executed under oath; and the information contained therein addresses these Defendants' employment duties and how they interacted with Plaintiff relative to this matter. Plaintiff cites *Ness v. Fresenius USA, Inc.*, 219 F.Supp.2d 799, 804 (E.D. Mich 2002) in support of his position that the affidavits should be stricken. However, in *Ness*, the Court did not strike the declarations in their entirety for lack of "personal knowledge" language. Rather, the *Ness* court struck only the statements that constituted hearsay information. A review of the affidavits at issue do not show that any of the statements constitute hearsay. Each statement deals specifically with a recitation of Epp and Mallo's employment responsibilities and their personal involvement with Plaintiffs case. Therefore, Ness is not persuasive relative to this point.

Since the Court accepts Defendant Epp and Mallo's affidavits as evidence of their involvement in Plaintiff's quest for combination drug therapy, the Court finds that these Defendants were not sufficiently involved with Plaintiffs circumstances to give rise to the level of a constitutional or statutory violation.

1. Eighth Amendment

Defendant Epp states in her affidavit the following in part: (1) "I oversee nursing, psychology and dental services in the region;" (2) "The only involvement I had in this case is responding to Prisoner Moultrie's step II grievance (JCF 02 03 01013-12D3) on April 18, 2002. I have no other knowledge of this case or prisoner;" (3) "I (Jan Epp) do not supervise the physicians, physician assistants and nurse practitioners at G. Robert Cotton; (4) "I (Jan Epp) do not supervise any staff employed at Duane Walter Hospital; and (5) "I (Jan Epp) do not

determine whether or not Prisoner Moultrie should receive the combination therapy for Hepatitis C)." (*Defendants Mallo's and Epp's Motion for Summary Judgment, Exhibit A*). Defendant Mallo states in her affidavit the following in part: (1)" . . . I was working as a nursing supervisor at the G. Robert Cotton Correctional Facility;" (2) Although I worked at G. Robert Cotton Correctional Facility, I had no direct involvement in the plaintiff's treatment;" (3) " . . . there are no factual allegations naming me other than indicating that I signed as a Reviewer of a Step I grievance response (See Complaint paragraph 24)." Based upon Defendants Epp and Mallo's degree of involvement with Plaintiff's case, the Court finds that it is insufficient to constitute any direct involvement with Plaintiff's circumstances.

Plaintiff, however, cites *Smith v. Michigan*, 256 F.Supp.2d 704 (ED. Mich. 2003) in support of his position that despite Defendants Epp and Mallo's supervisory status, they are still subject to liability. The Court recognizes that the *Smith* court found the supervisor defendants in that case to be liable for constitutional violations against the plaintiff prisoner. However, the factual circumstances are substantially different from those before this Court. The rule of law in *Hayden* is that if the supervisor is found to have "either encouraged the specified incident of misconduct or in some other way directly participated in it" then the supervisor could be subject to constitutional liability." *Poe v. Hayden*, 853 F.2d at 429. In *Smith*, the supervisory defendants were found to have directly participated in denial of plaintiff's follow up medical treatment subsequent to his release from the hospital, the deprivation of which caused plaintiffs death. *Smith v. Michigan*, 256 F.Supp.2d at 711. The *Smith* facts are not on point with those before this Court. Consequently, *Smith* is not instructive or authoritative relative to the Eighth Amendment violation issue in this case.

Plaintiff's citation to *Boyd v. Rhode Island, Dept. of Corrections*, 160 F.Supp.2d 213 (D.R.I. 2001) is equally inapposite to the facts relative to Defendants Epp and Mallo. In Boyd, the individual party defendants were the physicians who

treated the plaintiff. Clearly, their involvement in those circumstances were direct, unlike with Defendants Epp and Mallo's degree of participation in Plaintiffs circumstances. Therefore, Boyd is likewise unpersuasive authority in support of Plaintiff's claim against Defendants Epp and Mallo.

Based upon the foregoing, the Court agrees with Magistrate Judge Scheer and finds that Defendants Epp and Mallo did not commit an Eighth Amendment violation relative to Plaintiff's medical treatment.

2. *Americans with Disabilities Act*

The Act states as follows:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. §12132. The term "public entity" means:

> (A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102 (4) of Title 49).

42 U.S.C. §12131(1). Since Defendants Epp and Mallo are not "public entities,"they cannot have committed a violation under the ADA. Plaintiff's ADA claim against these Defendants was properly dismissed by Magistrate Judge Scheer.

B. Liability of Dr. Craig Hutchinson and John Smith

1. Eighth Amendment

Prison authorities may be sued for deliberate indifference to the serious medical needs of prisoners under the Eighth Amendment because such indifference constitutes the unnecessary and wanton infliction of pain. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The defendant's conduct or lack of conduct must demonstrate a knowing indifference to serious medical needs. *See, e.g., Hicks v. Frey*, 992 F.2d 1450, 1454-57 (6th Cir.1993). A prison official exhibits deliberate indifference by intentionally denying or delaying access to medical care. *Estelle*, 429 U.S. at 104-05. "Deliberate indifference, however, does not include negligence in diagnosing a medical condition." *Sanderfer v. Nichols*, 62 F.3d 151, 154 (6th Cir.1995). Moreover, differences of opinion between a plaintiff and his doctor regarding his diagnosis and treatment do not state an Eighth Amendment claim. *Estelle*, 429 U.S. at 107; *Westlake v. Lucas*, 537 F.2d 857, 860 n. 5 (6th Cir.1976).

The record in this case reflects the fact that Plaintiff was suffering from Hepatitis C and that he had received medical treatment and evaluation for the disease. C. Kanduru, M.D. and J. Ahmed, M.D. , documented that the monotherapy treatment that was administered for Plaintiff's condition several years earlier appeared to no longer be working toward keeping his Hepatitis condition under control and that combination drug therapy of Ribavirin and Interferon should be considered. (*Plaintiffs Objections to Magistrate's Report and Recommendation, Exhibits 12, 15, 20, 21*). Because Plaintiff's request for the combination drug therapy was denied by Defendants Hutchinson and Smith, Plaintiff asserts that his medical treatment was consciously disregarded by these Defendants, constituting an Eighth Amendment violation. *Id., Exhibits 4 and 5*). However, the record clearly shows that these Defendants were not deliberately indifferent toward Plaintiff's

medical circumstances.

Drs. Kanduru and Ahmed did not state that combination drug therapy was required at this juncture of Plaintiff's medical treatment. These doctors opined that the combined drug therapy would be the next step in Plaintiff's treatment. However, these doctors further stated that before the implementation of such a treatment, further discussion about and/or a medical evaluation for the treatment was indicated. *Id.* These Defendants permitted such discussion and evaluation testing to take place on April 15, 2002. (*Plaintiffs Complaint, Exhibit 17*). An "ultrasound guided liver biopsy and ultrasound of liver" were performed and the results were as follows:

> Normal ultrasound examination of the liver. No lesions are identified. Successful ultrasound guided liver biopsy performed by Dr. Renner. *Id.*

Based upon these results, Defendants did not find that combination drug therapy was warranted.

Plaintiff cites *Boyd v. Rhode Island, Dept. of Corrections*, 160 F.Supp.2d 213 (D.R.I. 2001) because the Plaintiff in *Boyd*, also suffering from Hepatitis C, survived summary disposition as to one of the defendant doctors. *Boyd v. Rhode Island, Dept. of Corrections*, 160 F.Supp.2d at 219. However, the Boyd court found that Dr. Spaulding "turned a blind eye"to plaintiffs Hepatitis C and hernia medical conditions. *Id.* Those are not the circumstances before this Court. The record clearly shows that Plaintiff was seen numerous times by several different doctors for various ailments. When there was an issue about the implementation of the combination drug therapy, the question was not ignored, but rather addressed by the administration of the ultrasound and biopsy procedures. It was only after the results of this test showed the liver was normal that Defendants stood by their initial opinion that Plaintiff was not a candidate for the combination drug therapy.

Accordingly, the Court does not find that Defendants Hutchinson and Smith consciously disregarded Plaintiffs

medical condition, nor were they deliberately indifferent to his Hepatitis C condition.

2. *Americans with Disabilities Act*

For the same reasons set forth above, Defendants Hutchinson and Smith are not liable under the ADA.

C. Liability of Correctional Medical Services, Inc.

Following the majority view that equates private contractors with municipalities when providing services traditionally charged to the state, Plaintiff's claims against CMS will only be successful if it was responsible for an unconstitutional municipal custom or policy. *Monell v. Dept. Soc. Servs. City N.Y.*, 436 U.S. 658, 690 (1978) ("Local governing bodies . . . can be sued directly under [42 U.S.C.] § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," footnote omitted) ; *Id.* at 690-91 ("[A]lthough the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 `person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental `custom' even though such a custom has not received formal approval through the body's official decision making channels.").

With respect to Plaintiff's claims against CMS he ultimately must establish two elements: First, the custom or practice must be attributable to [CMS], i.e., it must be "so well settled and widespread that the policymaking officials of [CMS] can be said to have either actual or constructive knowledge of it yet did nothing to end the practice." *Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1St Cir.1989). Second, the custom must have been

the cause of and "the moving force" behind the deprivation of constitutional rights. Id. at 1157; *Miller v. Kennebec County*, 219 F.3d 8, 12 (1st Cir. 2000).

In this case Plaintiff failed to plead the requisite factual allegations to sustain his burden of proof relative to this issue. Instead, Plaintiff only argued that CMS has a contract with the Michigan Department of Corrections to provide medical services to inmates. (Plaintiff's Complaint, 116). The Court finds that Plaintiff's claims against CMS are insufficient to sustain a viable cause of action. Accordingly, the Court agrees that any claims against CMS must fail because Plaintiff did not allege the existence of an unconstitutional policy or custom. *See Johnson v. Outboard Marine Corp.*, 172 F.3d531, 535 (8th Cir.1999).

1. Americans with Disabilities Act

For the same reasons set forth above, CMS is not liable under the ADA. CMS, a private contractor, cannot be considered a public entity. Vandermolen v. City of Roosevelt Park, 1997 WL 853505, *1 (W.D. Mich. 1997). In Vandermolen, the court dismissed plaintiff's ADA claim against a city's independent contractors, as they were outside the scope of the ADA's definition of a "public entity."

Additionally, in order for Plaintiff to be deemed disabled, he must suffer from a physical or mental impairment that substantially limits one or more of his major life activities. *McKay v. Toyota Motor Manufacturing*, 110 F.3d 369, 371 (6th Cir. 1997). From the Court's review of Plaintiff's Complaint, it finds that there are no allegations of what major life activities of Plaintiff were limited, nor are there any allegations that the major life activities are *substantially limited.* In *Gowesky v. Singing River Hospital Systems*, 2003 WL 253111 (5th Cir. 2003), the court found that an employee with Hepatitis C was not disabled within the meaning of the ADA.

Additionally, the Seventh Circuit found liver function was not a major life activity within the meaning of the ADA in

Furnish v. SVI Systems, Inc. 270 F.3d 445 (7th Cir.2001); see also, *Boyer v. KRS Computer & Business School*, 171 F.Supp.2d 950 (Dist. Minn. 2001) (finding Hepatitis B was not a "disability" as the disease did not substantially restrict performance of a major life activity). (*Defendants' Dr. Hutchinson, [John] Smith, P.A. and Correctional Medical Services' Motion to Dismiss, pg. 14*) .

Further, Plaintiff fails to direct the Court's attention to any comparable situations which would give rise to a discriminatory basis for CMS' decision to deny approval of the combination drug therapy. Finally, Plaintiff has not made any allegations that he has been excluded from participation in any of the services, programs, or activities of the Michigan Department of Corrections.

For these reasons, the Court does not find that the CMS committed an ADA violation.

V. Conclusion

For the above reasons, the Court ACCEPTS Magistrate Judge Scheer's Report and Recommendation. Accordingly, this Court ADOPTS Magistrate judge Scheer's Recommendation and GRANTS Defendants', Hutchinson, Smith and CMS's, Motion to Dismiss. The Court further ADOPTS Magistrate Judge Scheer's Recommendation that Defendants' Epp and Mallo's, Motion for Summary Judgment be GRANTED.

IT IS HEREBY ORDERED that the Report and Recommendation **[Docket No: 19-1, FILED July 31, 2003]** in this matter is **ADOPTED**.

IT IS FURTHER ORDERED that Defendants', Mallo's and Epp's, Motion for Summary Judgment Under Fed. R. Civ. P. 12 (b) (6) and 56 (b), and 42 U.S.C. 1997E **[Docket No: 15-1, filed July 2, 2003]** is **GRANTED**.

IT IS FURTHER ORDERED that Defendants', Dr. Hutchinson, John Smith, P.A., and Correctional Medical Services' Motion to Dismiss **[Docket No: 4-1, filed June 10, 2003]** is **GRANTED**.

/s/
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

DATED: January 16, 2004

UNITES STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN MOULTRIE,

Plaintiff,

Civil Action No.
03-CV-71516-DT

vs.

DISTRICT JUDGE
DENISE PAGE HOOD

MAGISTRATE JUDGE
DONALD A. SCHEER

DR. C. HUTCHINSON, JOHN SMITH, LAURA MALLO, JAN EPP, and CORRECTIONAL MEDICAL SERVICES, INC.,

Defendants.
_____/

JUDGMENT

The above entitled matter having come before the Court by that Defendants', Mallo's and Epp's, Motion for Summary Judgment Under Fed. R. Civ. P. 12(b) (6) and 56(b), and 42 U.S.C. 1997E and Defendants', Dr. Hutchinson, John Smith, P.A., and Correctional Medical Services' Motion to Dismiss, and in accordance with the Memorandum Opinion and Order entered on this date ADOPTING the Magistrate Judge's Report and Recommendation and GRANTING Defendants' Motions,

judgment is entered in favor of all Defendants and against Plaintiff.

DAVID WEAVER
CLERK OF THE. COURT

By: /s/_____
DEPUTY CLERK

APPROVED: January 16, 2004

/s/_____
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 532
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

DIANE KUNTZ
(513) 564-7014
www.ca6.uscourts.gov

Filed: January 14, 2005

John Moultrie

Ronald W. Chapman

RE: 04-1220
Moultrie vs. Hutchinson
District Court No. 03-71516

Enclosed is a copy of an order which was entered today in the above-styled case.

Very truly yours,
Leonard Green, Clerk

/s/
(Ms.) Diane Kuntz
Case Manager

Enclosure

cc:
Honorable Denise Page Hood
Mr. David J. Weaver

No. 04-1220
UNITES STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN MOULTRIE,

Plaintiff-Appellant

vs. **ORDER**

DR. C. HUTCHINSON, JOHN SMITH, LAURA MALLO, JAN EPP, and CORRECTIONAL MEDICAL SERVICES, INC.,

Defendant-Appellees.
_____/

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

Before: SUHRHEINRICH, ROGERS, and COOK, Circuit Judges.

John Moultrie, a Michigan prisoner proceeding pro se, appeals a district court's order in his civil rights action granting summary judgment to two defendants and dismissing the remaining three defendants for failure to state a claim under Fed. R. Civ. P. 12(b)(6). This case has been referred to a panel

of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Moultrie filed a civil rights complaint, pursuant to 42 U.S.C. § 1983, seeking declaratory relief, injunctive relief, and compensatory and punitive damages against Dr. C. Hutchinson, a health care professional; John Smith, a physician's assistant; Laura Mallo, a registered nurse; Jan Epp, the Regional Health Care Administrator; and Correctional Medical Services, Inc. ("CMS"). Moultrie alleged that the defendants were deliberately indifferent to his medical needs; discriminated against him in violation of the Americans with Disabilities Act, 42 U.S.C. § 12131 ("ADA"); violated his right to life under the Fourteenth Amendment; and violated his rights to equal protection and due process under the Michigan Constitution. Specifically, Moultrie alleged that he suffered from hepatitis C; he should have received combination therapy ("CT") to treat it; several physicians had recommended CT; and the defendants denied CT, notwithstanding his worsening condition and elevated alanine aminotranserase levels ("ALT").

Mallo and Epp moved the court for summary judgment and dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Hutchinson, Smith, and CMS also moved to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). A magistrate judge recommended granting summary judgment to Mallo and Epp. The magistrate judge also recommended granting Hutchinson, Smith, and CMS's motion to dismiss. Over Moultrie's objections, the district court accepted and adopted the magistrate judge's recommendation. Moultrie timely appealed.

As an initial matter, Moultrie did not address his claims on right to life or the state constitution on appeal; therefore, they are deemed abandoned. *See Robinson v. Jones*, 142 F.3d 905,906 (6th Cir. 1998).

Moultrie first argues that the district court erred in granting Mallo and Epp summary judgment. Procedurally, Moultrie argues that the district court erred by failing to give him an

opportunity to respond to the defendants' motion for summary judgment, and in considering two affidavits submitted by Mallo and Epp in support of their motion. On the merits, Moultrie argues that the district court erred in granting Mallo and Epp summary judgment because they: (1) directly participated in his failure to receive medical care; and (2) were aware of his diagnosis and recommended course of treatment but failed to intervene.

We review a district court's grant of summary judgment de novo. *Smith v. Ameritech*, 129F.3d 857, 863 (6th Cir. 1997). Summary judgment is appropriate when the evidence presented shows "that there is no genuine issue as to any material fact and that the moving party is entitled toa judgment as a matter of law." Fed. R. Civ. P. 56(c). The party opposing a motion for summary judgment may not rest upon the mere allegations or denials of his pleading. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Moultrie's argument that the district court should have permitted him to respond to the motion for summary judgment is unavailing. Moultrie was not prejudiced by his inability to respond because his objections to the magistrate judge's recommendation, considered by the district court, set forth his position as to the motion for summary judgment. Moultrie's argument that the district court considered unsworn affidavits based upon second-hand knowledge is also misplaced because Mallo and Epp's affidavits were made under oath, notarized, and based upon their personal knowledge.

The district court did not err in granting Mallo and Epp summary judgment. Section 1983 liability will not be imposed solely upon the basis of respondeat superior. *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984). Rather, to prevail, a plaintiff must show "that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it." *Id.* Minimally, a plaintiff must show that the supervisory official implicitly authorized or knowingly acquiesced in the unconstitutional conduct of the offending subordinate. *Id.* Additionally, individuals may not be held

liable merely on the basis that they failed to remedy a prisoner's grievance. *See Poe v. Haydon*, 853 F.2d 418, 429 (6th Cir. 1988); Pounds v. Myers, No. 03-5220, 2003 WL 22146129, at *1 (6th Cir. Sept. 11, 2003). Moultrie has alleged only that Mallo and Epp handled his grievances; he has not shown that either Mallo or Epp were actively involved with or approved of his medical treatment. Accordingly, the district court did not err in granting Mallo and Epp summary judgment.

Moultrie also argues the district court erred in dismissing Hutchinson, Smith, and CMS under Fed. R. Civ. P. 12(b)(6). Moultrie argues the defendants were deliberately indifferent to his medical needs, given that two doctors recommended on three occasions that he receive CT, he had been diagnosed with hepatitis C for over ten years, his ALT levels had been elevated for over one year, and CT was the appropriate treatment for him.

We review de novo the district court's dismissal of a complaint under Fed. R. Civ. P. 12(b)(6). *Miller v. Champion Enters., Inc.*, 346 F.3d 660, 671 (6th Cir. 2003). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "The facts set forth in the complaint must be accepted as true, so long as they are well pleaded." *Miller*, 346 F.3d at 671. While the standard for the dismissal of a claim under Rule 12(b)(6) is quite liberal, "more than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988).

Prison authorities may be sued for deliberate indifference to the serious medical needs of prisoners under the Eighth Amendment because such indifference constitutes the unnecessary and wanton infliction of pain. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 660 (6th Cir. 1994). Allegations of medical malpractice or negligent diagnosis and treatment fail to state an

Eighth Amendment claim of cruel and unusual punishment. *See Estelle*, 429 U.S. at 104-06; *Sanderfer v. Nichols*, 62 F.3d 151, 154 (6th Cir. 1995). "Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law." *Westlake v. Lucas*, 537 F.2d 857, 860 n.5 (6th Cir. 1976).

The district court did not err in granting the defendants' motion to dismiss. The theory of respondeat superior cannot provide the basis for liability in § 1983 actions. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); *Taylor v. Mich. Dept of Corr.*, 69 F.3d 76, 80-81 (6th Cir. 1995).

Finally, Moultrie argues that the district court erred in finding he failed to state a claim under the ADA because CMS was a public entity, given its contract with the state to provide medical care to inmates. Moultrie also argued that he had a disability that substantially limited a major life activity and that he was discriminated against, evidenced by his lack of appropriate medical care.

The district court properly dismissed or granted summary judgment on Moultrie's ADA claim. Regardless of whether the defendants are public entities Moultrie was not disabled under the ADA. A "disability" under the ADA is a physical or mental impairment that substantially limits one or more major life activities. *McKay v. Toyota Motor Mfg. U.S.A., Inc.*, 110 F.3d 369, 371 (6th Cir. 1997). Moultrie's bare allegations of the limitations on a major life activity are insufficient to establish he was disabled. *Anderson*, 477 U.S. at 248; Scheid, 859 F.2d at 436.

For the foregoing reasons, the district court's decision is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ _____
Clerk

60 FEDERAL APPENDIX

This case was not selected for publication in the Federal Reporter

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited. a copy must be served on other parties and the Court.

David JOHNSON, Plaintiff—Appellant,
v.
George MILLION, Warden; Dr. Ameji;
Dr. Richard Kimbler, Defendants- Appellees.

No. 02-6089.

United States Court of Appeals,
Sixth Circuit.

March 7, 2003.

State inmate filed § 198 suit alleging that prison officials and state agencies violated his Eighth Amendment rights by denying medical care after he became infected with hepatitis C virus (HCV) and developed various symptoms. The United States District Court for the Eastern District of Kentucky entered summary judgment in favor of defendants, and inmate appealed. The Court of Appeals held that officials were not deliberately indifferent to inmate's medical condition.

Affirmed.

Prisons (Key No.) 17(2)

Sentencing and Punishment (Key No.) 1546

Prison medical officials were not deliberately indifferent to inmate's medical condition, in violation of Eighth Amendment, after he contracted hepatitis C virus (HCV), even though they did not provide any treatment, where inmate was seen in prison hepatitis C clinic every three to four months, but was provided no treatment because his liver enzyme levels (ALT) had stayed within normal range. U.S.C.A. Const. Amend. 8.

Before MARTIN, Chief Judge; ROGERS, Circuit Judge; and EDMUNDS, District Judge.*

ORDER

David Johnson, a pro se Kentucky prisoner, appeals a district court judgment dismissing his civil rights complaint filed pursuant to 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument merit is not needed. Fed. R. App. P. 31(a).

Johnson filed suit against several prison officials and state agencies for violating his Eighth Amendment rights by denying medical care after he became infected with the hepatitis C virus (HCV) and developed various symptoms. Upon screening by the district court and the filing of an amended complaint, the case proceeded against a warden (Million), a prison physician (Ameji), and the state prison medical director (Kimbler). The district court granted summary judgment in favor of the defendants and dismissed the action on August 5, 2(102.

---

*The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.
of Michigan, silting by designation

In his timely appeal, Johnson reasserts his claim that the defendants have denied him medical treatment for HCV and for pain.

Upon de novo review, we conclude that the district court properly granted summary judgment to the defendants. See Fed. R. Civ. P. 56(e); *Harrow Prods., Inc. v. Liberty Mitt. Ins. Co.*, 64 F.3d 1015, 1019 (6th Cir.1995).

The grant of summary judgment as to Million and Kimbler was proper because any notice of Johnson's problems which they may have received through the grievance system or Johnson's letters was insufficient to make them personally liable for the alleged deprivation of treatment. *See Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir.1984).

The grant of summary judgment as to Ameji was proper because he was not deliberately indifferent to any of Johnson's medical needs. A prison official exhibits deliberate indifference and thus violates the Eighth Amendment by, inter alia, intentionally denying or delaying access to medical care for serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). In their motion for summary judgment as supplemented, the defendants included copies of Johnson's medical records as well as affidavits from Ameji and an HCV expert, Dr. Shedlofsky. Ameji indicated that Johnson was seen in the prison hepatitis C clinic every three to four months and that no treatment for HCV had been provided because Johnson's liver enzyme levels (ALT) had stayed within the normal range. Shedlofsky indicated that he had reviewed Johnson's records and agreed with Ameji's assessment, and that it was "standard and clinical practice not to perform liver biopsies or treat with interferon and ribavirin those Hepatitis C patients whose ALT values remain normal."

Review of Johnson's medical records also shows an absence of evidence that his complaints about pain were ignored. Ameji has repeatedly examined Johnson concerning his complaints of stomach pain and has prescribed medications, ordered blood tests, and advised Johnson concerning his diet. Johnson also has access to over-the-counter painkillers through the prison

canteen.

Accordingly, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rule: of the Sixth Circuit.

36 FEDERAL APPENDIX

This case was not selected
for publication in the Federal Reporter

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

David C. ZIMMERMAN,
Plaintiff--Appellant,
v.

PRISON HEALTH SERVICES, INC
et al., Defendant--Appellees

No. 01-3301.

United States Court of Appeals,
Seventh Circuit.

Submitted March 20, 2002.*

Decided March 25, 2002.

Inmate brought § 1983 action seeking preliminary injunction ordering Department of Corrections to provide him with specific treatments for his Hepatitis C illness. The United States District Court for the Northern District of Indiana, Robert L. Miller, Jr., J., declined to issue the injunction, and inmate appealed. The Court of Appeals held that defendants did not act with deliberate indifference.

Affirmed.

---

*Because there are no appellees to be served in this appeal, the appeal has been submitted without the filing of a brief by the appellee. After an examination of the brief and the record, we have concluded that oral arguments is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R.App. P. 34(a)(2).

1. Injunction (Key No.) 138.1

In order to obtain a preliminary injunction, a plaintiff must prove (1) that his underlying case has some likelihood of success on the merits, (2) that no adequate remedy at law exists, and (3) that he will suffer irreparable harm if the injunction is not granted.

2. Sentencing and Punishment (Key No.) 1546

Deliberate indifference to an inmate's health needs, in violation of the Eighth Amendment, exists only where an official knows of and disregards an excessive risk to inmate health or safety; official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. U.S.C.A. Const. Amend. 8.

3. Provisions (Key No.) 17(2)

Sentencing and Punishment (Key No.) 1546

Corrections official did not act with deliberate indifference to health needs of inmate suffering from hepatitis C, in violation of the Eighth Amendment; physician. made medical judgment not to inoculate inmate against hepatitis A, delay in liver biopsy resulted from bureaucratic obstacles and possible negligence rather than deliberate indifference, and requested combination therapy usually does not begin until after biopsy has been performed. U.S.C.A. Const. Amend. 8.

4. Sentencing and Punishment (Key No.) 1546

Excessive delays in medical diagnosis' or treatment can establish deliberate indifference to an inmate's medical needs, in violation of Eighth Amendment. U.S.C.A. Const. Amend. 8.

5. Federal Courts (Key No.) 612.1

Inmate waived appellate review of is sue of whether prison staff delayed medi cal care because inmate refused to participate in a religiously-oriented drug treatment program; inmate did not present issue to district court, but raised it for first time on appeal.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 3:01-CV-0392. Robert L. Miller, Jr., Judge.

Before BAUER, CUDAHY, and DIANE P. WOOD, Circuit Judges.

ORDER

David Zimmerman claims in a 42 U.S.C. § 1983 suit that prison doctors and administrators have treated his Hepatitis C condition with deliberate indifference. As part of that suit he sought a preliminary injunction ordering the Indiana Department of Corrections to provide him with a Hepatitis A vaccination, a liver biopsy, and therapy combining drugs effective against Hepatitis C. The district court declined to issue the injunction, and Zimmerman brought this interlocutory appeal. See 28 U.S.C. § 1292(a)(1).

[1] In order to obtain a preliminary injunction, Zimmerman needed to prove to the district court (1) that his underlying case has some likelihood of success on the merits; (2) that no adequate remedy at law exists; and (3) that he will suffer irreparable harm if the injunction is not granted. *Ty, Inc. v. Jones Group Inc.*, 237 F.3d 891, 895 (7th Cir.2001). Focusing on the first and third prongs, the district court found that Zimmerman's case is not likely to succeed on the merits and that he would not suffer irreparable harm in the absence of an injunction.

[2] On appeal Zimmerman attempts to show that he is

likely to succeed on the merits. But in order to prevail in his § 1983 suit, Zimmerman must prove that the defendants acted with the "deliberate indifference" that transforms ordinary instances of malpractice into constitutional violations. *Farmer v. Brennan*, 511 U.S. 825, 837-38, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1904). Deliberate indifference exists only where an official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* As evidence of deliberate indifference, Zimmerman presented the district court with documentation detailing the defendants' decision not to innoculate him against Hepatitis A, the thirteen month delay between the time that a physician first ordered a liver biopsy (June 2000) and the time when the prison eventually scheduled it (July 2001), and the defendants' failure to provide him with combination therapy thus far.

[3, 4] None of this evidence establishes that the defendants disregarded an excessive risk to his health. The record reveals that a physician at the prison made a medical judgment not to innoculate Zimmerman against Hepatitis A because there have been no cases of Hepatitis A infection in the Indiana prison system for the past ten years. And although excessive delays in medical diagnosis or treatment can establish deliberate indifference, see *Langston v. Peters*, 100 F.3d 1235, 1240 (7th Cir.1996), the evidence presented to the district court here suggested that the delayed biopsy stemmed not from deliberate indifference but rather bureaucratic obstacles and perhaps negligence difficulties, prison staff errors in filling out the form to request the biopsy, and Zimmerman's transfer from a Kentucky prison back to Indiana so that Indiana could treat him according to its protocols. Furthermore, according to doctors' letters in the record and Indiana's protocol for treating prisoners with Hepatitis C, combination therapy usually does not begin until after a liver biopsy has been performed to determine the patient's particular Hepatitis C genotype; nothing presented to the district court suggests that the defendants disregarded

Zimmerman's condition and withheld combination therapy. Against this factual backdrop, we cannot say that the district court erred by finding that Zimmerman's case was not likely to succeed. *See Garvin v. Armstrong*, 236 F.3d 896, 898 (7th Cir. 2001) (" A difference of opinion as to how a condition should be treated does not give rise to a constitutional violation."); *Sellers v. Henntan*, 41 F.3d 1100, 1102–03 (7th Cir.1994) ("It would be a great mistake . . . to infer . . . that a series of purely negligent acts can be equated to an act of deliberate indifference.")

[5] For the first time on appeal, Zimmerman also presents evidence tending to show that prison staff delayed his medical care because he refused to participate in a religiously oriented drug-treatment program. Although we have disapproved of the state forcing prisoners to participate in such programs, *see Kerr v. Farrey*, 95 F.3d 472 (7th Cir.1996), Zimmerman waived appellate review of this issue by not presenting it to the district court, *see Moulton v. Vigo County*, 150 F.3d 801, 803 (7th Cir.1998).

Because we affirm the district court's finding that Zimmerman's case is not likely to succeed, we need not address whether he would suffer irreparable injury in the absence of an injunction. *See Curtis v. Thompson*, 840 F.2d 1291, 1297 (7th Cir. 1988). We do note that Zimmerman admits in his brief that he finally received a liver biopsy on October 1, 2001, which moots his request that defendants be required to carry out that procedure. We assume that the defendants will promptly begin whatever treatment is dictated by the biopsy's results. Finally, because this case is ongoing in the district court, we do not have jurisdiction to review Zimmerman's argument regarding the district court's dismissal of his claim that Prison Health Systems, Inc. encourages its employees to delay and deny needed heal care. *See* 28 U.S.C. § 1291.

AFFIRMED

---

*After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R.App. P. 34(a)(2).

REPORT
SICK ON THE INSIDE

Correctional HMOs and the coming prison plague
By Veil S. Hylton

Wil S. Hylton is a writer at large for GQ magazine.

When David Hannah walked into a small office on the second floor of the Moberly Correctional Facility in Moberly, Missouri, last fall, carrying his belly like a hundred-pound sack of sand, the staff knew him well enough not to worry about what he might break or steal or soil in their private offices, which were normally not accessible to inmates, so I was able to close the door behind him, and we sat together and talked about what was happening to his body. He was a pale, fifty-seven-year-old white male, serving a sentence of life plus three years for rape, and his gray hair was matted to his head. His face was as worn and gaunt as a much older man's.

Hannah was angry. "Look at it," he said, glaring at his gut. "Do you want to see it?"

I didn't want to see it, but I nodded anyway. I had come precisely to see it, to witness Hannah's disfigurement, the fruit of a long series of medical miscalculations. It had begun in the 1980s with two kinds of hepatitis, B and C, a condition that prison doctors had largely ignored for a decade, then treated with a series of botched, questionable procedures that caused David's cells to cease performing osmosis properly, so that over time his natural body fluids began to collect, trapped inside his gut with no way to evacuate, his midsection swelling to accommodate those fluids, expanding to such a size and weight that the mere act of walking around had given David, by December 2000, a pair of hernias, neither of which the prison doctors had bothered to treat. David stood now to show me the belly and the hernias, the condition his body had arrived at through an utter lack of attention. He pulled his flannel shirt to the side of his waist and lifted his gray T-shirt, and, in spite of

myself, I winced. His belly was enormous, taut and pasty, seemingly glued to his gaunt frame. At the front of it, a hot-pink hernia, about the size of a grapefruit, seemed barely attached where the belly button should have been, giving David's midsection the overall contour of a giant breast and nipple. Bracing myself, I asked him where the other hernia had emerged. He studied me, obviously not fond of baring his physique. After a moment, he shrugged and unbuttoned his pants.

To describe David's scrotum as swollen and red would be a failure of language. It was about the size of a rugby ball, so raw and irritated, shiny and crimson, that it almost seemed to be covered with blood. David hung his head. "They give me aspirin," he said.

Later, when I heard that David had died of indeterminate causes and that his body had been cremated, I realized that I had probably been the last person outside of the prison staff to see David alive, to see what his body had become from all those years of mistreatment, and I wondered: Can such a secret he kept?

It occurs to me now that prisons are designed for keeping secrets, for holding inside not just men but also their lives and the details of those lives. In prison, social isolation is a matter of policy, and inmates are neither expected nor encouraged to have more than a modicum of contact with the outside world. This is not necessarily, or at least not ostensibly, vindictive. In many cases, isolation is the prison's approach to rehabilitation. As Alexis de Tocqueville observed nearly two centuries ago, "Thrown into solitude [the convict] reflects. Placed alone, in view of his crime, he learns to hate it; and if his soul be not yet surfeited with crime, and thus have lost all taste for anything better, it is in solitude, where remorse will come to assail him."

Still, the social isolation of prisoners creates a host of difficulties, not least of which is that of monitoring their treatment, of ensuring that they are assailed only by their own remorse and not by anything else—by, say, other prisoners, or by those who keep the watch. Opacity, after all, runs both ways,

and if the prison walls keep convicts in, they work just as effectively to keep observers out.

This problem is only made worse inside the prison infirmary. By its very nature, medicine is a private matter, and a prisoner's medical records are protected by the same confidentiality laws that protect free citizens. This means that a prisoner's medical chart is both locked inside a physical fortress and shielded by a battery of privacy restrictions, all of which leaves the field of prison medicine cloistered and nearly impossible to survey. Compounding this is the fact that prison medicine, and, indeed, the principles of medicine itself, are fundamentally at odds with all other facets of prison life. Even the term "prison medicine" borders on oxymoron: Whereas prison is designed to alienate and punish, medicine exists to nurture and soothe. So where is the boundary between care and punishment? At what point do they meet?

Until the 1970s, which is to say for the first two centuries of American life, these were not questions that anyone felt compelled to ask, let alone answer. As a matter of law, prison medicine had always been considered a privilege, not a right, and the final authority on treatment was not a doctor or even a court but the local warden. Prisoners whose medical needs were not being met, whose broken noses and diabetes were left untreated, who were stabbed and not sewn, feverish and not medicated, prisoners who had cancer but no treatment, who had prescriptions that wardens refused to fill, whose mental health teetered at the edge of self-destruction—those prisoners had no recourse, nor reason to expect it. In the early 1970s, a survey of jails by the American Medical Association found that fewer than 30 percent had medical facilities and only about one in five had a formal arrangement with any medical provider.

Things began to change in 1971, when an uprising at the Attica penitentiary in New York forced the subject of prison conditions into the national conversation. Amid a flurry of laws enacted in response to Attica, state and federal legislators began crafting measures to guarantee basic health care to prisoners. Although the laws have changed over the past thirty years, little

else has. If anything, prison health care is in further decline now than ever. Most departments of correction have chosen not to invest in medical infrastructure but rather to farm out the business to subcontractors, and these days a single, private corporation controls the health care of all prisoners in ten states and manages a portion of inmate health care in another seventeen, having underbid competitors everywhere it exists. Correctional Medical Services is not merely the nation's largest provider of prison medicine; it is also the nation's cheapest provider, a perfect convergence of big business and low budgets. But unlike the traditional HMO, whose risk of a malpractice suit is real, and is felt, and is reflected to at least some degree in the quality of medical care, companies such as CMS have little or no reason to protect themselves. Most juries are reluctant to decide in favor of a convict, and those juries that do favor the convict are often reluctant to award money. Cost-benefit analysis takes on special, human overtones behind bars.

Perhaps even more significantly, private companies such as CMS feel no responsibility, and have no legal obligation, to account to the public for what goes on inside their facilities. So, while CMS receives about $550 million of taxpayer money each year, the company chooses not to provide any accounting of how that money is spent or even how much of it is spent—and how much unspent, to be pocketed as profit. And although lawsuits over the years have revealed discredited health-care professionals working in CMS facilities, the company refuses to reveal the names of its doctors and nurses for verification or to provide any account of how many have been disciplined or had their licenses revoked in other states. With CMS responsible for so many patients nationwide, it is fair to say that the practice of medicine in prison has reached an unprecedented level of inscrutability—indeed, secrecy—and if this fact seems abstract or unlikely to affect regular folks in the general population, well, just wait until the hepatitis epidemic comes flooding out of the gates.

For those of you who have never been personally acquainted

with the hepatitis virus, allow me to describe it briefly. In the spring of 1995, I downed the wrong glass of frozen margarita some-where in the Chihuahua desert and unleashed the disease on my insides. Unaware, I took a bus back to Juarez a few days later, walked across the border, drove home to Albuquerque, and, when the travel itch returned a few weeks later, set out for Glacier National Park, where I intended to spend thirty days in the back country, mountaineering. By the time I arrived in Montana, however, the virus had begun to set in, and 1 found myself overwhelmed by fatigue. Deciding to get some rest before starting out, I found an empty cabin near the boundary of the park, crawled down to the basement, settled into a bed, and, with one last glance at my backpack by the door, passed out. When I woke up several days later, I was lying on my back in a medical facility 120 miles away with an IV in my arm and a sign on the door that said, "Warning: Take Enteric Precautions Before Entering." Asking around, I learned that I had been delivered to the medical center by a friend who worked in the park. My liver-enzyme levels, upon check-in, had been gauged at more than a hundred times the normal level. The first time I looked in the mirror, I saw that my jaundiced skin was roughly the same color and texture as a dried tangerine. I spent several days lying in place, flitting in and out of consciousness, playing host to an array of curious physician's assistants, nurses, and certified nursing assistants, some of whom ran tests on my urine and blood while the rest mostly stood around marveling at how odd I looked. That was the beginning. For the next six months, I was forced to live at my parents' ouse, where my daily priorities became eating healthy food, sleeping at least half of each day, and wishing that my perpetual headache would relent. This was the face of hepatitis A, the least virulent strain of the virus.

The difference between the type of hepatitis I contracted and, say, hepatitis C, which is the most severe strain, is mostly a matter of intensity. My hepatitis eventually went away; hepatitis C, in most cases, does not. It keeps on attacking your liver for the rest of your natural life. That means people with

acute hepatitis C can essentially forget about all the wonderful things that livers do, such as fighting infections, filtering toxins, and storing energy. To make matters worse, people with hepatitis C are contagious for the rest of their lives. Even twenty years after their initial infection, even if the virus is in remission and they feel pretty good, they still constitute a walking weapon and had better be careful where they bleed. It is worth noting; then, that somewhere between 20 and 40 percent of American prisoners are, at this very moment, infected with hepatitis C, and therefore quite contagious. It is also worth noting that most of them will eventually be released back into the general population, where the infection rate is, for now, only about 2 percent. The Association of State and Territorial Health Officials noted in a 2000 report that "an estimated 1.4 million HCV-infected persons pass through the correctional system each year." And although the virus is most pervasive in prison because of the high incidence of injected drugs there, it can be transmitted just as easily on the outside through sex, blood transfusion, or even a nasty fistfight.

With a scourge like this roiling on the inside, threatening to boil over to the outside, you might expect prisons to adopt some kind of screening policy for inmates and to institute a treatment offensive for the afflicted. Unfortunately, no such national program exists. Although the cost of a hepatitis test is only a couple hundred dollars, very few facilities volunteer to provide them, and there has been no federal legislation to require the measure. "It's a missed opportunity," says Dr. Cindy Weinbaum of the Centers for Disease Control and Prevention. "The number of prisoners with hepatitis C is incredibly high. It's unbelievable."

The fact that most prison doctors have not seized this opportunity doesn't reflect any inherent challenge to their doing so. On the contrary, a couple of states have developed simple and effective hepatitis programs that test all prisoners upon intake, making the disease relatively easy to track and monitor. One of those states is Texas, and there, not surprisingly, prison health care is managed not by a private company like CMS but

by two universities, the University of Texas and Texas Tech University. Dr. David Smith, who is the chancellor of Texas Tech and who led the battle to make hepatitis screening mandatory in Texas, assured me that the hepatitis program he created is not very special at all, or anyway that it shouldn't be. "It's just the smart thing to do," he said. "We have almost 30 percent of our prison population in Texas infected with hepatitis. That's not so different from the numbers you see in the Dark Ages with the plague."

When I visited a handful of CMS facilities last fall, I found a very different attitude. Under CMS care, 214,000 inmates are expected to petition for any hepatitis tests they want, and even if those petitions are granted, and the tests given, and the results positive, the chances of getting any kind of treatment are only slightly better than of getting a presidential pardon. This became most obvious to me when I heard the story of Larry Frazee.

I met Larry at the Western Missouri Correctional Center in Cameron, about four hours west of St. Louis. He was a gaunt little man with a circular face surrounded by brownish-gray hair, and his thin mustache seemed to weigh on his lips when he spoke. He walked with a silent shuffle, and from the black bruises under his eyes you could see that he hadn't slept well in months, if not years. When I began reading through his medical record, it was easy to see why. Larry had first been diagnosed with hepatitis in the early 1990s, when a prison plasma center rejected him as a donor. The diagnosis had been confirmed by a prison infirmary in June 1994, but even so, between then and the end of 1997, he had managed to wrangle only a half dozen doctor's visits. It wasn't until January 2000, a full five and a half years after his diagnosis, that CMS doctors began formally monitoring his condition. Even then, treatment was not forthcoming. As Larry discovered, CMS doctors required him to meet a long checklist of conditions, known as a "protocol pathway," before he could receive any treatment for his disease. Some of those items required off-site consultations. One of the things he needed, if he wanted treatment, was a liver biopsy.

But when Larry went to the prison infirmary to ask for one, he learned that he had to have a psychological evaluation first, then enroll in a drug-abuse awareness class and sign a slew of forms releasing CMS from liability for anything that might happen during the biopsy. So Larry did those things one by one, and he signed the papers, and he went to see the biopsy specialist, who promptly sent him back to his cell because he didn't know his virus genotype. Larry couldn't find anything in the protocol pathway that required him to know his genotype, but to be a good sport he put in a request at the infirmary for a genotype test. A few weeks later, he got the test, but the laboratory somehow screwed up his results, so he had to file for a second test and wait for a second appointment and a second set of results before, in February of last year, he finally returned to see the biopsy specialist, who sent him away again, this time saying that Larry shouldn't bother getting treatment anyway, because it can be somewhat dangerous. Larry argued that it was his decision to make, and that he wanted the treatment, or at least the biopsy that he was entitled to, and maybe afterward, when he had the biopsy results and could take an informed look at them, he would be willing to discuss the risks of treatment, but the doctor just shook his head. The decision was final, he said. No biopsy. He sent Larry back to his cell, where Larry has been ever since, without a biopsy, without any treatment, feeling sick and tired and a bit like he failed himself.

But what Larry didn't realize, and what he's only now beginning to grasp, is that he never had much of a chance in the first place. As a matter of formal company policy, CMS discourages treatment for hepatitis, and the protocol pathway is just a way of making it harder for prisoners to demand it. Although a CMS spokesman insisted that CMS doctors are private contractors and that "it is the individual physician's responsibility to make sure care is given to patients,"an internal memo from CMS regional medical director Gary Campbell to his fellow directors in February 1999 reveals just how much authority the doctors really have at CMS. "I am not encouraging anyone to undergo therapy,"the medical director wrote.

"However, if you have someone that is insistent, then this pathway is to be followed." Campbell added, "Unless I have given you specific approval to do Hep C testing, do not do so unless the patient has obvious moderate to severe liver disease or has exposure as described by the exposure policy of the DOC. Remember, all Hep C testing has to be approved by me."

And so, for the 214,000 prisoners whose health is supervised by CMS, the hepatitis epidemic continues to grow, untested and untreated, virtually unencumbered by the forces of modern medicine, while people like Larry Frazee remain right where the company wants them: stalled along the protocol pathway. Whether or not this is legal remains to be decided. In January of this year, the University of Michigan law program filed suit against CMS for failure to address the hepatitis problem in that state. If their case is successful, similar lawsuits may follow in other stares. Until then, however, the policy stands: No testing, no treatment.

"CMS is an HMO with a captive audience," says David Santacroce, the professor who is spear-heading the Michigan Lawsuit. "The fewer patients they treat, the more money they make."

"This is deliberate indifference," adds Michael Steinberg, legal director of the Michigan ACLU."There is a standard for testing and treatment of hep C that the Centers for Disease Control cameout with, and CMS simply is not heeding it. It's not just hepatitis, either. You talk about the tip of the iceberg! There is a systemic problem of not providing good health care to prisoners. Hepatitis is the tip of it, but there's a long list of issues below the surface that we haven't even begun to address."

Some of those issues have been addressed in other courtrooms, however, in other states, by other groups, and taken as a whole, the litany of malpractice crimes committed by CMS doctors begins to read like a horror novel. Take the in-mate in Alabama who died of dehydration and starvation in a CMS infirmary after receiving care that one medical director described as "non-existent"and "a gross departure from medical community standards." Or the inmate in the same state who

died when CMS staffers injected him with the wrong medicine. Or the CMS doctor in New Mexico who testified that he was required by the company to prevent off-site referrals. Or the district judge in Idaho who found that an inmate's care in the state prison "more closely resembles} physical torture than incarceration." Or the inmate in Nevada who died because a CMS doctor canceled her prescription for insulin. Or the federal judge in Michigan who described CMS follow-up care as "bureaucratic purgatory." Or a U.S. Justice Department inquiry in Virginia, which found that CMS medical records "failed to meet any known professional standard."Or the district court monitor in Georgia who found that CMS ran a "medical gulag" in the state prisons, giving one prisoner ibuprofen forhis lung cancer and making another wait ten months to see a doctor for a broken arm.

Yet, perhaps because juries so rarely award money to convicts, there is essentially no incentive for lawyers to bring these crimes together into a comprehensive, class-action lawsuit. Without the lure of a large settlement, most trial attorneys are unwilling to fork out millions of dollars in research and lost wages to fund such a massive endeavor. As a result, the central figure in the movement against CMS is not a major national law firm or even a renegade lawyer, but an aging, confrontational activist named Karen Russo.

I met with Karen, who runs a prisoner-advocacy group called the Wrongful Death Institute, one evening last winter at her home in the suburbs of Kansas City, and she invited me inside to sit at the small wooden table in her dining room, where we ate meat loaf and potatoes while her three dogs scurried around and her teenage kids and their friends traipsed up and down the stairs. Karen was undaunted by the chaos around her. When she had finished eating, she smoothed her dark brown hair behind her ears, sat back in her chair, and, as if she were in an office or behind a podium, she cleared her throat, blinked her heavily painted eyes, and launched into a tirade against CMS, her voice ringing through the house fervently, sometimes furiously.

"They don't want anyone to know what's going on in these facilities," she said. "Getting medical records and company documents is like going up against Fort Knox. We have to resort to all sorts of methods. We have a network of prisoners across the country who have ways of getting paperwork out to us, a couple of pages at a time. We have nuns who go in and bring documents out with them. We have nurses, doctors, whistleblowers. It's a war for information, and CMS knows it. They're just waiting to take me out. They hate me. Every Monday at noon I do a radio show on a local station, and it's like a fireside chat. The CMS headquarters is just over in St. Louis, so they have people listening. Everybody wants to know, `Who's she going to get today?'And it could be anyone. I could go after a nurse, I could go after a doctor, I could go after the corrections staff. And I've gone after all of them. I'm putting together a file on every one of them. I call out their names on the air. `Nurse so and so, I want you to know that I'm onto you.' And the prisoners are listening, too. This thing is growing like wildfire. A couple of years ago I was getting maybe two or three letters a week; now it's anywhere from twenty to thirty letters a day, from all over the country. Of course, some of those are from CMS decoys. That's what they're doing now—they get offenders to write me letters that say, `I'm not sick, but I heard about what you're doing and I was just wondering how you got start- ed,' and so on. You know, just dripping with it. They want to know what I've got. But I'm not naive: I can see right through that; I can smell it. They're scared, and they should he. We've got them. I know what they're doing."

Karen's invective seemed over the top, but she was the genuine article: a nearly obsessive crusader who had long ago discarded any semblance of a normal life in favor of late-night phone calls with sick inmates and interminable afternoons poring over their medical records. The dust on her antique piano had become so thick and sticky that it made my eyes itch after only a few bars, and the ceiling in her bathroom was crumbling to the floor. Yet Karen's memory was immaculate; she had converted herself into a database of detail, packed with accounts

of prisoners met, their medical histories, life stories, and extraneous personal minutiae. To reinforce this glut of information, the back rooms of her house were stuffed with thousands of papers, most of which she could locate and produce within a few frenzied moments. When pressed, she could also furnish names and numbers for a whole range of sources, including guards and activists and prisoners' family members (though she was more reluctant to reveal others, such as the nuns and nurses she claims to consult). In her utter submersion into the topic, Karen had even developed a personal bond with one of the prisoners, a man named Raymond Young, who was locked up nearby on drug charges and whose persistent back problems and hernias kept him in a wheelchair, but who gave off an almost eerie radiance on the clay I met him, with a great, black, bald head that shone like an eclipsed sun and a grin full of golden teeth inscribed with the numbers 3, 3, and 1/3. ("Thirty-three and a third,"he said in a gravelly whisper. "I'm a traveler. A lone traveler.")

On the night I visited Karen, however, she took me to meet a different friend, Leland Hunley, who had only recently been released from the prison where Raymond is housed. When I saw Leland's apartment, it was hard for me to imagine that he was any more comfortable than he had been on the inside. His building, an indistinct brick high-rise, was in the kind of neighborhood that most middle-class people choose not to know about. There were crack dealers selling openly and loudly on the corner and drunks fighting in the street. The Plexiglas front doors were smeared with random grub and old graffiti, and the spun-polymer carpeting of the lobby seemed almost melted across the floor. Up the clattering elevator a few floors, down the narrow, echoing hallway, Leland's door opened into a single shabby room where he sat in a wheelchair watching a fuzzy television set that was on top of a little table above a small collection of right-footed shoes. Leland's left leg was missing. "Come on in," he mumbled to us, pointing toward a couple of chairs and wheeling himself around beside them. I sat down, and we made small talk for a minute, then Leland cut to the

story. "Basically, what happened was, I was living on the bay," he said. "That's the common area. It wasn't meant to be a living quarters, but the rooms were all full, so they had to put about thirty or forty cots in the bay, and I lived on one of them. I was there for about a year. The whole time, they never turned out the lights. But anyway, I was getting up for breakfast one morning and I reached over and put my sock on, and I felt a sting. So I pulled the sock back off and a spider run out of it. Welt, I stomped it. I knew it was a brown recluse, pretty good size, so I scooped it up on a piece of paper to bring to the infirmary." Leland shook his head at the memory and ran a bony hand over his short white hair. "But see, you can't just walk into the infirmary. You've got to fill out a whole deal called a Medical Service Request, and then they'll call you whenever they get to you. By the time I got up there, it was a couple hours later. The bite was swelled up to the size of a quarter. I showed it to the nurse, and she put a salve on it and sent me back. I mean, you could just look at it and see that it was going to get infected. It was swollen, throbbing, hurting like crazy. So a couple days later, I put in to go back, and she soaked my foot in a solution. It got to where she was doing that every three or four days. I would put up an MSR and she'd soak it and wrap it up again. I could tell it wasn't getting better, but I wasn't allowed to look at it or anything. I could get a conduct violation if I took the bandage off. Every time she unwrapped it, though, it looked worse. It was a big black welt on top of my foot, with a red holein the middle. After a while, you could see my bone through the hole. It kept opening up more. At one point they had a doctor to lance it and drain out the pus. It looked like it might get better after that, hut it didn't. it just swelled up more. Eventually, my whole foot got black. It was just a big black scab. That's when they started giving me antibiotics, but it was already too late. I couldn't even walk. Finally, the nurse took off the bandage one time and just run out of the room. She was really upset. I don't know what she told the doctor, but it wasn't a matter of a day before they was taking me to the hospital. The doctor said, `I'm gonna have to take it off.' There was nothing

I could say at that point. He told me, `If you refuse, it'll kill you.' So I said, `Okay, take it off.'"

At fifty-eight, Leland couldn't have weighed more than 120 pounds, with knobby shoulders and elbows and a thin wisp of a neck. He rubbed his knees while he spoke, hunched over in his wheelchair, weak and almost emaciated. Toward the end of the interview, Karen, who had been struggling to remain silent, broke in to ask if he was okay. "You look like you're losing weight,"she said.

He shrugged. "Well,"he said. "You know, I can't get to the store by myself"

To someone on the outside, what happened to Leland's leg might sound, at the most fundamental, instinctive level, like a blatant case of malpractice. The notion of losing a leg to a spider bite has no place in the modern sensibility, and the suggestion that a person waft several weeks to receive antibiotics for an infection is al-most unthinkable (though Leland's medical records confirm it). But like so many other things in prison, the term "malpractice" is inscrutable. On the outside, if a doctor does not conform to certain standards of care, then he is guilty of negligence, plain and simple, and finding a trial attorney to sue him is no challenge. By contrast, in prison, mere negligence is not necessarily enough for a lawsuit. Most prison malpractice cases are filed under the Eighth Amendment, which guarantees protection from cruel and unusual punishment. Unfortunately, in order to convict a prison doctor under these terms, the inmate must prove not only that the doctor provided substandard care but also that he did so intentionally. This rather elusive criterion is called "deliberate indifference,"and under its protective banner a prison doctor is free to be as negligent and irresponsible and incompetent as he wants, just as long as he is not intentionally causing patients to suffer. Needless to say, this makes the practice of prison medicine significantly harder to regulate, and the care of patients harder to ensure. What could be more difficult to prove—or more secret—than a man's unstated intentions?

While I was visiting Karen and Leland in Kansas City, I

placed a call to CMS headquarters in St. Louis, hoping to interview someone there. I did not have high expectations. I had already called several times from my home in New Mexico (another CMS state) trying to arrange interviews with hospital administrators and doctors and nurses, but I had mostly been ignored. On those occasions when my calls were returned, the CMS spokesperson had, in an exasperated tone, made it clear that virtually every member of his medical staff was far too busy to spend time with reporters, and that furthermore this would remain the case indefinitely, no matter how flexible my schedule was, no matter when I offered to visit. The timing, he explained, was simply awful, and it was not likely to get any better, ever.

Still, 1 held out some hope. Calling from within the state, I figured, would seem more real and immediate to them; and besides, I was no longer planning to ask for interviews with medical staff, or even company higher-ups, but to settle for a sit-down with the spokesperson, which seemed like a modest request, to say the least. I had even begun looking forward to that interview, wondering how the spokesperson might respond to the accusations I was hearing. I could imagine that some of his points might be reasonable. Certainly, prison medicine must be difficult to administer, and I assumed that the spokesperson would be eager to point out just how difficult, and to illuminate the challenges of working with convicts, of sorting through faked illnesses and phony requests for medicine, ornery personalities and violent outbursts.

But when Ken Fields, the spokesperson, called me hack, and I mentioned my desire to visit, he didn't sound nearly as eager as I had hoped.

"What do you want to talk about?" he asked. "How were your interviews with inmates?" I explained that most of them were angry at CMS, which was why I wanted to get his point of view. "I think we're going to have to handle this on the phone," he said. I suggested that it would be preferable to meet in person, since I had met the inmates in person and didn't want them to have an advantage, but he replied, 'We've had bad

experiences with the media." 1 assured him that I knew this, yet 1 felt that, as a member of the company's communications team, he needed to communicate the company's message, but he insisted, "I can't do it this week. I'm too busy." I offered to return the following week, but he repeated that he preferred to speak on the phone. So I repeated my preference to meet in person, and he repeated that he was too busy. Then I repeated my offer to return, and he repeated his preference to speak on the phone. So it went, until finally, perhaps just to stop the routine, he barked, "Well, I don't want you to come back here. Why don't you just stop by tomorrow?" I agreed and we hung up, but a couple of hours later, I found a message on my voice mail from Fields, saying that he had decided not to meet with me in person.

"It's a situation where we have been misquoted at times in the past," he said, "and we're gonna respond to your questions in writing. So I wanted to give you notice of that. Thanks, bye."

But even in response to written questions, Fields was hardly forthcoming: of the fourteen questions posed, he offered only eight complete answers. For example, he was willing to provide rudimentary statistics about the company, such as the wtal number of patients under CMS care, but would not describe any company protocols or reveal how much money the company actually spends on patients, except to insist that, of the more than half a billion dollars that CMS receives in taxpayer money each year, a "very, very significant portion goes to patient care."Although he was quick to claim that all CMS doctors and nurses are licensed in the states where they work, he dodged the question of how many have been suspended or had their licenses revoked in the past or in other states, insisting that the company is "not obligated"to reveal those statistics. Nor would he answer the question of whether or not the company has any plans to begin screening for hepatitis, claiming that CMS leaves those decisions to state legislatures and individual doctors, a claim contradicted not only by the company's detail-heavy and restrictive hepatitis pathway but also by the internal communications of its regional medical director.

Since CMS officials were declining the chance to meet with me, or to set up nterviews, or even to talk on the phone anymore, I decided to contact some of their employees directly. This turned out to be easier than I expected. Nurses tend to know one another, and after speaking with a few nurses who didn't work for CMS, I was able to reach a few nurses who had once worked for CMS and, finally, nurses who still do. At the very least, I hoped they would take the time to reassure me that the gritty standard of "deliberate indifference" was not being met; that nurses and doctors were not intentionally ignoring their patients. But what 1 heard from CMS nurses was, in many ways, more upsetting than what I had heard from inmates. One conversation in particular stands out.

I had reached Christy through a series of referrals by other nurses and their friends. At first, she was anything but eager to speak with me. Her relationship with CMS was still good, and she didn't want that to change. Although she was no longer working in the jail in the northern United States where she had been a CMS supervisory nurse for half a decade (she had left to manage a hospital facility), she was considering a return to the company and didn't want to jeopardize her ability to do that. The money was good at CMS, she explained, and besides, she didn't need them as enemies. But after thinking about it and talking with her friends, Christy decided to speak with me anyway, mostly because, as she put it, she needed to tell somebody what she had seen and done, especially what she'd done.

I was immediately drawn to Christy's story, even before I had heard the details. As a supervisory nurse, she had been the highest-ranking member of the medical staff on duty, so she had been privy to many of the political and economic machinations behind company policy. 1 was also interested to hear about jailhouse medicine in general. People in prison, after all, have been convicted of a crime and have forfeited some of their rights (the right to vote, the right to own handguns, etc.), but most people in jail are still awaiting trial, and they haven't necessarily been convicted of anything. Not only have those awaiting trial not forfeited their rights; they are still officially

innocent. Our legal system takes great pains to insist on this, so I was curious to know whether or not it made any difference to CMS.

The short answer, according to Christy, was no. "The way we treated inmates was a horror," she said. "Whenever a new inmate came in, the`,would have to see me, and I would assess their medical condition. If it looked like they were going to require any kind of serious treatment, I would go to the lieutenant and explain what I felt the cost of the treatment would be. I would say, 'We have this person here, and the treatment is going to be horrendously expensive. We need to get them out of here.'If they were a real serious criminal, like a murderer, the liability was high, so they would keep them under arrest and we would incur the cost of treatment. But if the lieu-tenant thought the person was not a serious risk to the community, he would proceed to get hold of judges and other people to try to release the in-mate, or make arrangements to get the bail lowered. The lieutenants would often call judges lateat night and on holidays to tell them the situation, then we would release the inmate and take them to the hospital, so CMS wouldn't incur the cost of treatment. The lieutenants went along with it because they didn't want to incur the cost of a deputy to stay with the inmate in the hospital. So we would let them know, and they would make a call and release the inmate, then they would take them to the hospital. After the inmate got their medical treatment, we would immediately rearrest them.

"We did this frequently also with pregnant in-mates. If they went into labor, we would release them or give them a signature bond, then re-arrest them and the child was put into the custody of child services. I did that for years. You just ignore what you're doing. The whole atmosphere of the jail was, these criminals, these convicts, these scumbags, they get what they deserve.

"Appointments were made for weeks or months down the road, knowing that the in-mate would not be there anymore. Or we would make appointments for days that we knew the inmate was going to be in court. They don't keep the trial dates in the

medical file, but you just call the booking desk up front and ask them when the trial date is. Then you make their next appointment for that date. We were told to tell them, there was a canned phrase, `Don't worry, you have an appointment. We just can't tell you when it is because of security reasons.' Spy you would be consoling someone, knowing full well that they weren't going to get to see any-body. You just put them right back at the bottom of the list again."

"It was absolutely appalling, to the point that I can't even tell you. You knew that as long as you worked there, you did not challenge any of it. But your disgust builds as the horrible cases build. Even though a good majority of these people ended up being guilty, I just felt from a moral standpoint that it was wrong. They always play up, `Well, look what they did to this other person,'so a lot of people say, `Okay, justice is served.' But the way I feel is, we've all taken an oath and we have a license, and just because one person has died, that doesn't mean that a second person dying or being denied care . . . one doesn't justify the other. As far as I'm concerned, if you're sick and you get into one of these places, you might as well he signing your death certificate. Even if you don't have a death sentence."

The more I spoke with nurses like Christy, and looked at inmate medical files, and studied infectious-disease statistics, the clearer it became that, no matter where you looked or to whom you spoke, this was a medical system run amok, one that not only ignored sick patients but was actually skirting the limits of the law and, in the process, helping to unleash an epidemic on society. As one nurse put it bluntly, "We have no accountability. If I deny care, that's it. You have no recourse." Yet the clearer this reality became, the more baffling it seemed. Wasn't anyone keeping track? Where had the media been?
In the course of nearly a decade, only two newspapers had undertaken major investigations of CMS, and both were located

---

**In response to these claims, CMS wrote, "Correctional health care staff make every effort to work with corrections agencies to coordinate such offsite trips in ways that do not create conflicts with scheduled court appearances."*

in Missouri, which has become a kind of ground zero in the debate over prison medicine, largely because CMS is headquartered there. Even more discouraging, the reporters who wrote those stories had, in the aftermath of their work, become just as tortured and frustrated as everyone else who confronts the company. Not long ago, one of them agreed to meet with me in the basement of his office, but within the first two minutes of our conversation he insisted that I keep his name out of my story. In the weeks after his articles appeared in the Columbia Daily Tribune, lie said, he had been under attack by CMS lawyers and publicists, who deluged his editors with denunciations, and he didn't want to be perceived as settling the score. He sat nervously with me, fidgeting, smiling, and trying to be as helpful as possible without getting further involved.

The other reporter I spoke with was less reserved, but only because he had less to lose. He had already lost it all. In 1998, Andrew Skolnick had been an editor at the Journal of the American Medical Association, a recent recipient of the Harry Chapin Media Award, and an inaugural fellow of the Rosalynn Carter Fellowship in Mental Health Journalism, which is a $10,000 grant. Using these lofty connections, he had managed to get himself and two journalists from the St. Louis Post-Dispatch into CMS facilities, where they spoke with several inmates and doctors before publishing articles in both JAMA and the Post-Dispatch, revealing a national pattern of abuse and neglect by CMS. As the organizing force behind both projects, Andrew had helped expose sever-al CMS doctors with checkered histories and hadrevealed more than a dozen cases of egregious mistreatment, some of which resulted in death. One story revealed a memo from the medical director of the New Mexico corrections department explaining that several prison doctors had quit because CMS administrative officials were "changing physicians' orders and adding orders with outseeing the patient or consulting the physicians directly." Another story exposed a CMS doctor in Alabama who had been convicted of having sex with a sixteen-year-old "mentally defective" patient

in Tennessee. Another described the chief of mental-health services for CMS in Alabama, whose license had been revoked in both Michigan and Oklahoma after he was found guilty of sleeping with patients, harassing female staff members, and defrauding insurance companies. The newspaper series had won awards from both Amnesty International and the American Medical Writers Association in the late 1990s, but even still, looking back, Andrew said that he wasn't always certain it had been a good idea to publish it. After the articles appeared, he told me, CMS had sent a letter to JAMA, accusing him of hiding his involvement with the Post-Dispatch, which they called "fraud," and threatening to sue the journal. Within a week, JAMA had fired An-drew and, although CMS later paid him to settle a defamation lawsuit,* his professional life never quite recovered. Even today, the editors of JAMA refuse to comment on "the conditions surrounding his termination" or to defend his award-winning expose, which has never been refuted or retracted.

"I had an exploding career," Andrew told me, "and it crashed. We may have won some awards, but the horrible fact is we lost. CMS won. After the articles appeared, they went to the state legislature in Missouri and protected themselves. They got a law passed expunging the records of physicians who are accused of malpractice in correctional facilities. So now, anytime the medical board doesn't take action on an allegation they disappear it. This means no pattern can emerge against a doctor. That is our legacy. That's our achievement. We actually made it worse."

But Andrew's investigation had a resonance far beyond that. It was his work that started CMS down the path of information lockdown, building barricades to public scrutiny, hiding numbers and statistics and the names of employee, refusing even to sit for a formal interview, and stifling the efforts of journalists to cover the field at all. Andrew's series had put

*According to CMS, "Company attorneys determined that a small settlement of Mr. Skolnick's baseless claim was less expensive than the cost of ongoing litigation."

pressure on CMS, but that pressure had only deepened the company's aversion to publicity. CMS officials were happy to continue operating with public funds, but they were no longer willing to provide any serious accounting of them.

Like almost any wound, the weakness of an institution festers without proper attention, and as CMS has retreated into its shell, its facilities have only grown worse. Outside of anecdotal evidence, however, it is difficult to assess exactly how much worse—it is nearly impossible, for example, to know how many doctors and nurses it employs, or how adequate its facilities are, or even what pathways and protocols it adheres to. Few lawsuits have managed to expose details of the company's inner mechanisms, and aside from the Michigan hepatitis suit there is no major legal action pending against the company at the moment, only scattered individual lawsuits—the great majority of them, it is safe to say, doomed. In Massachusetts a small network of attorneys has been threatening to file a comprehensive class-action suit, but nothing has gained much traction so far. And although the U.S. Justice Department has reportedly kept an open file on CMS since the mid-1990s, collecting evidence and reviewing cases, no formal charges have been leveled against the company, and sources say it is not a high priority in the post-9/11 climate. Even Karen Russo has her doubts that CMS will change. "It's not going to happen," she says. "They don't want to be rehabilitated. They probably can't be rehabilitated. So the only solution is to get rid of them, and they're going to fight that in every state, at every step. They're going to use all their money and power. and they have a lot."

But if the battle over prison health care is beginning to seem lost, littered with the bodies of the wounded, the sick and sickened alike, with inmates and nurses and journalists by the wayside, if the whole field seems deathly unwell and bordering on hopeless, it may, in the end, have more to do with the way we look at prisons in general than with anything CMS has done. This is not to obscure or to apologize for the company's failures and crimes. It is simply to suggest that the secrecy afforded to prisons would be easy enough to strip away. When we, as a

culture, choose to see our prisoners as a part of our society (which they are, of course, and an ever growing part), when we remove the wall of secrecy that surrounds the prison itself, when we are willing to face and bear witness to the punishments we disburse, there will be no more need to wonder what is being done on the inside, in our names.

No. _____

In The
Supreme Court of the United States

JOHN MOULTRIE,

Petitioner,

v.

DR. C. Hutchinson,
JOHN SMITH, LAURA MALLO, JAN EPP,
CORRECTIONAL MEDICAL SERVICES,

Respondents.

PROOF OF SERVICE

I, John Moultrie, Petitioner in the above cause, hereby deposes and states that on June 6, 2005, I sent via First Class Mail, three (3) true copies of Petitioner's Petition for Writ of Certiorari to all attorneys of record for all parties in the instant case.

John Moultrie #169151
(In Pro Se)

No. _____

In The
Supreme Court of the United States

JOHN MOULTRIE,

Petitioner,

v.

DR. C. Hutchinson,
JOHN SMITH, LAURA MALLO, JAN EPP,
CORRECTIONAL MEDICAL SERVICES,

Respondents.

CERTIFICATE OF MAILING

I, John Moultrie, Petitioner in the above cause, in pro se, on June 6, 2005, gave one (1) original and thirty-nine (39) copies of Petitioner's Petition for Writ of Certiorari to Michigan Department of Corrections prison officials for mailing to this Court in accordance with MDOC Operating Procedure 05 03.118.

I, John Moultrie, declares under penalty of perjury, that the foregoing is true and correct.

Executed on: _____

John Moultrie #169151
(In Pro Se)